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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

INTERNATIONAL DISTRIBUTION CENTERS, INC.,
Petitioner,

—v.—

WALSH TRUCKING CO., INC., COASTAL FREIGHT LINES, INC., HEMPSTEAD DELIVERY CO., INC., NATIONAL RETAIL TRANSPORTATION, INC., FRANCIS J. WALSH, JR., KENNETH B. HENNING, MARK S. TICE, RAYMOND WEISS, CARMINE SABATINI and CHUCK HANNON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether in enforcing the Sherman Act this Court should resolve a conflict among circuits as to the need for independent proof of dangerous probability of monopolization in the interest of the uniform guidance of business conduct throughout the United States?

2. Whether direct proof of specific expressed intention to monopolize and anticompetitive acts which affected price and excluded competition demonstrates a dangerous probability of successful monopolization or must courts also conduct economic tests measuring percentage of market share and height of entry barriers?

3. Whether this Court should exercise its supervisory power over the Court of Appeals which misconstrued applicable principles of antitrust law and misapprehended, failed to consider, or grossly misapplied the evidence to the attempt to monopolize, dangerous probability, and monopoly conspiracy standards?

4. Whether when one defendant intends to violate the antitrust laws and separate defendants meet with him and assist him in continuing anticompetitive acts both before and after accepting beneficial employment with him, this Court's rulings in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) and *Matsushita Electronic Indus. Co. v. Zenith Radio Corp.*, ____ U.S. ____, 106 S.Ct. 1348 (1986) preclude an inference of a conspiracy in violation of Sections 1 and 2 of the Sherman Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

International Distribution Centers, Inc. ("IDC") petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 1987-1 Trade Cas. (CCH) ¶ 67,457. That opinion reversed the Second Amended Judgment of the United States District Court for the Southern District of New York (John F. Keenan, D.J.), which was based upon an opinion (Appendix B) reported at 618 F.Supp. 98, denying defendants' motion for judgment notwithstanding the verdict and an opinion reported at 62 Bankr. 723 (S.D.N.Y. 1986) granting plaintiff injunctive relief and awarding attor-

neys' fees. The Second Amended Judgment appears as Appendix C. An earlier opinion of the District Court (Robert J. Ward, D.J.) granting a preliminary injunction is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on February 24, 1987. By order entered March 24, 1987, that court stayed entry of its mandate for thirty days pursuant to Fed. R. App. P. 41(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, . . .

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .

STATEMENT OF THE CASE

A. Nature Of The Case and Proceedings Below

This is a private antitrust case brought by IDC alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). Federal jurisdiction in the district court was based on 28 U.S.C. § 1331. The Court of Appeals reversed the judgment of the district court which was based upon a jury verdict of $38,261,967 (after trebling and a remittitur of $1,364,124) and ordered the trial court to enter judgment for defendants. After a thirty-one day trial, careful instructions, and three days of deliberation, the jury in answering special interrogatories found that defendants had attempted to monopolize, conspired to monopolize, and conspired to restrain trade in the market for the carriage of garments on hangers among garment manufacturers, suppliers, contractors, and retailers along the New York, New Jersey, Pennsylvania route ("GOH Pennsylvania Corridor Market"). The jury rejected IDC's state law claims regarding trade secrets. After extensive briefing and oral argument, Judge Keenan denied defendants' motion for judgment notwithstanding the verdict and subsequently granted IDC permanent injunctive relief.

In reversing the district court, the Court of Appeals based its decision solely on its view of the record; no legal error was found, except as to the sufficiency of the evidence. The Court of Appeals misapprehended both the legal arguments advanced by IDC and the extensive record evidence, which not only demonstrated the existence of a dangerous probability that defendants would be successful in their attempt to monopolize the GOH Pennsylvania Corridor Market, but also established the existence of a conspiracy among the former IDC employees (Messrs. Henning, Tice, Weiss, Sabatini and Hannon) and defendant Francis J. Walsh, Jr.

B. The Industry and Parties Involved

This case concerns the method of entry by Mr. Walsh into the GOH Pennsylvania Corridor Market and his proven expressed intention to monopolize that market. Simply stated,

the market here is garment center trucking of garments on hangers ("GOH"). It involves the movement of piece goods and materials from New York City garment manufacturers to Eastern Pennsylvania, where contractors assemble the garments (primarily women's blouses and dresses) and return the finished garments, on hangers, to the manufacturers. For over 40 years IDC had been a competitor in this $45 million annual market which consisted of fewer than ten small trucking companies. IDC's market share was said to be approximately fifty percent. In 1982, Walsh,[1] who had grown, in less than ten years, from two trucks to an $80 million annual general freight and local garment center carrier, decided to enter and take over the GOH Pennsylvania Corridor Market.

Defendant, National Retail Transportation, Inc. ("NRT") was the trucking company, of Walsh's constellation of over twenty entities, chosen to operate in the Pennsylvania corridor. The other corporate defendants did so in a limited fashion or their operations were subsumed by NRT. Other than Frank Walsh, the individual defendants were all former longstanding IDC employees, three of whom were terminal managers, two regional sales managers and one assistant terminal manager. All six key employees under solicitation of Mr. Walsh resigned from IDC and started working at NRT within a four week period in 1982.

C. The Material Facts

After three key employees had resigned and gone to NRT, IDC's President, Gerald Eskow, requested a meeting with Frank Walsh. At the meeting on November 3, 1982, Mr. Walsh expressed both his intentions to monopolize the GOH Pennsylvania Corridor Market and his methodology: he would either buy his competitors, or destroy them by undercutting their prices and/or hiring their key executives. In addition to his stated intention of monopolization, Mr. Walsh directly threat-

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1 Francis J. Walsh, Jr. is an individual defendant and the head of all corporate defendants. "Walsh" is used concisely as a shorthand for his and the corporate defendants' names.

ened "to completely obliterate IDC" and "to mount [Mr. Eskow's] head on his wall." In 1979, Mr. Eskow's predecessor at IDC had been murdered gangland style in her driveway. Mr. Walsh's threat took on special meaning, appreciated by the trial judge and jury. The details of the meeting were memorialized by Mr. Eskow in a detailed four page memorandum (PX 93).[2]

The memorandum describes Mr. Walsh's plan to take over the entire market and outlines the specific steps, including acquisitions, predatory pricing, and use of threats to discipline the market. Testimony and documents at trial revealed that Mr. Walsh made good on his intentions—further key employees were hired from IDC and other competitors; a pattern of voluntary and involuntary acquisitions of competitors emerged; customers switched to Walsh overnight; Walsh's prices were shown to be below its average variable costs; and competition in the market was severely damaged.

1. Intention

The intention to monopolize, elegantly expressed by defendant Walsh and repeated in PX 93 and elsewhere, contained specific monopoly-inducing measures which Walsh authored in advance. Walsh reinforced the plan by accomplishing most of the anticompetitive acts with which he threatened Mr. Eskow at the November 3, 1982 meeting: predatory pricing, acquisition of competitors, buying up of senior employees of competitors, and other activity showing Walsh's power in the market and potential for market power. The district court concluded "that there was overwhelming evidence that defendant Frank Walsh had a specific intent to monopolize." 618 F.Supp. at 100 (B.26a).[3]

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2 For the Court's convenience, PX 93 is reproduced as Appendix D. All references to the Appendices will be by letter and page number, e.g., D.43a.

3 Although the Court of Appeals recognized that it was Walsh's intention to monopolize the entire relevant market, its analysis is based on the more limited and inadequate premise that Walsh's intention was to merely drive IDC out of business. This inconsistent reading of the record evidences the court's over-simplification of the facts and legal issues. (For further discussion, see p. 20 *infra*).

2. Defendants' Anticompetitive Acts

As he explained to Mr. Eskow, Walsh planned to take over the market by either buying out or destroying his competition. His "heavy sales campaign" included "whatever it [took] to get the business," (PX 93, item 1, D.44a). In accordance with that plan, Walsh bought out much of the area's competition, and then, unable to buy out IDC, commenced his attack to destroy it and other competitors in the market.

(a) *Acquisitions*

Frank Walsh admitted that before his raid on IDC he commenced a pattern of acquisitions of local trucking companies with which he competed: Hempstead Delivery and its subsidiaries, Bradley's Express and Store Services. Walsh also purchased an interest in Merit, another area trucker, with annual revenues of over $5 million, for next to nothing, shut it down and serviced its customers. Walsh also admitted he considered buying Ehrlich-Newmark and other corridor competitors. Such acquisitions are described in the grim prophesy, reported in Appendix D, PX-93 (Items 1, 4, 5, 6, 7, D.44a-45a).

In fact, Walsh tried to buy IDC. Failing to obtain this goal, he proceeded to implement his plan for destroying IDC, which he detailed at his meeting with Mr. Eskow on November 3, 1982. Walsh explained to Eskow, if he could not buy out his competition, "he would attack," and he described his strategy in detail. His two major forms of attack were (1) luring the competitor's key employees and (2) cutting rates (PX 93, items 1, 3, D.44a).

(b) *Unmeritorious Hirings*

Walsh hired IDC's key employees: those who were the backbone of IDC's operating structure, some who had been so for decades. Walsh hired them at salaries up to double their salaries at IDC. To service the Pennsylvania corridor business, Walsh hired key people from Goodman's Express, Drake, Tofca, Gilbert, Curtis, and Flex-Leasing, as well as all the

employees from Nelson after he acquired it. "When the enemy was annihilated" Walsh said "he would discharge the executives he seduced." (PX 93, item 1(b), D.44a).

(c) ***Predatory Rates***

Walsh entered the market with rates below the competition. Customer witnesses at the trial confirmed the fact that NRT prices were 20 to 25 percent below IDC's, and that they switched to NRT solely because NRT's rates were considerably cheaper. These customers did not switch to anyone else, because Walsh was cheapest.

More importantly, IDC's experts analyzed all available NRT cost and revenue data and determined that Frank Walsh had made good on his threat to use non-compensatory rates to destroy his competitors. NRT priced its Pennsylvania corridor GOH services substantially below its *average variable costs*, resulting in revenues of $4.5 million, expenses of $7 million and a loss of $2.5 million for the first nine months of operation. The trial court confirmed "that plaintiff's experts applied correct standards as to fixed and variable costs. Moreover, plaintiff offered evidence which, if believed, could lead the trier of facts to conclude that defendants' pricing was neither temporary nor designed to acquire new business lawfully." 618 F.Supp. at 101 (B.28a). This finding was undisturbed by the Court of Appeals.

(d) ***Customer Acquisition***

Among other methods, Walsh used the enigmatic Michael Pappadio to get business for his companies. It was Mr. Pappadio who, on a visit with an NRT representative, induced Dorby Frocks, for twenty-five years one of IDC's largest customers, without explanation, to switch completely a $750,000 account to NRT on one day's notice given shortly after Pappadio's visit. Within nine months of entering the Pennsylvania corridor, NRT was able to capture hundreds of plaintiff's customers and those of other competitors by using influence and quoting predatory rates. IDC's customers did not give it a

chance to match NRT's price. No verifiable proof of dissatisfaction with IDC's service was presented. Once customers were acquired, Walsh's strong arm tactics in dealing with customers included losing the customers' garments until their bills were paid. (PX 93, item 15, D.47a). This exemplifies his control over the customers in the market.

The evidence of anticompetitive behavior was overwhelming. The Court of Appeals' statement that they conducted a "careful search of the record" and found predatory pricing, but "no evidence of other anticompetitive conduct" (A.17a) illustrates the fact that the court wore the defense's blinkers while reviewing the record.

3. Defendants' Potential Monopoly Power

All of the market characteristics used to indicate ability to obtain monopoly power show that defendants were capable of controlling prices and excluding competition in the GOH Pennsylvania Corridor Market.

(a) *Market Share*

NRT only obtained a 17 percent share of the market by the end of 1983. The issuance of the preliminary injunction in January of 1983 and pendency of the lawsuit created an *in terrorem* effect on defendants and was the only reason IDC was able to survive Walsh's onslaught through the trial. In 1983, had Walsh succeeded in destroying IDC, he would have had at least IDC's share of fifty percent of the market, plus an even greater share because of the evidence that NRT garnered customers from other market competitors.[4] On July 15, 1985, IDC petitioned for relief under Chapter 11 of the Bankruptcy Code. In June 1986, IDC ceased operations and liquidated substantially all of its assets.

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4 The Court of Appeals ignored the record by failing to account for customers switching from other competitors to NRT when it concluded that "[e]ven if NRT drove IDC out of business and took over *all* of IDC's accounts, NRT would still have a market share of no more than fifty percent." (A.12a)

(b) ***Strength of the Competition***

The record reflected that the other companies competing in the Pennsylvania Corridor GOH Market: IDC, Tri-State, Silver Line, GTS, and Ehrlich-Newmark, were all significantly smaller companies than Walsh. In fact, the gross sales in all markets of all of the above companies (approximately $44 million) do not total the sales of the Walsh organization ($80-$85 million). IDC's expert confirmed that several of the other large general freight truckload and less-than-truckload ("LTL") carriers would never consider competing for GOH trucking business because of the special handling requirements. Walsh's companies were truly the largest economic force in the market.

(c) ***Probable Development of the Industry***

At trial, defendants took the position that there was a continuing decline in Pennsylvania corridor GOH traffic. While IDC offered evidence that the industry had taken an upswing in 1982, neither side would dispute the fact that significant expansion of the industry was unlikely to take place.

(d) ***Elasticity of Consumer Demand***

The alternatives to Pennsylvania corridor GOH trucking are twofold: (1) have your garments made elsewhere or (2) transport them in cartons. The record indicated, however, that use of these alternatives could not replace the need for Eastern Pennsylvania contractors, and the shipping of their garments on hangers. Although many garments are manufactured in New England, the South, and the Orient, these areas rarely provide contractors which can compete with Eastern Pennsylvania contractors on quality, proximity, and price. Mr. Walsh testified that manufacturers prefer hangers against cartons because of greater inventory control, neatness, and easier storage. One of the manufacturers testified that ninety-nine percent of the time the finished garments are shipped on hangers.

(e) ***Nature of the Anticompetitive Conduct***

Defendants intended to monopolize the market by doing whatever it took to get the business. Defendants' acts demonstrating an anticompetitive purpose include a pattern of acquisitions, the hiring of employees to damage competitors rather than on merit, the use of predatory pricing which was neither temporary nor designed to acquire business lawfully, and customer intimidation. The acts were truly "bold, relentless and predatory." *Lorain Journal Co. v. United States*, 342 U.S. 143, 149 (1951); *cf. Times-Picayune Publ. Co. v. United States*, 345 U.S. 594, 627 (1953).

(f) ***Barriers to Entry***

The district court found "ample evidence of barriers to entry into the market." 618 F.Supp. at 101 (B.27a). Among the evidence was proof of the substantial capital investment required, the need for trained labor, specialized handling procedures and equipment, knowledge of the garment manufacturers and Pennsylvania contractors, and the requirements imposed by intrastate regulation.

Perhaps the most prominent barrier to entry became established as soon as NRT entered the market—Mr. Walsh himself. Mr. Walsh's intentions to monopolize the market, his general strategy of buying or destroying his competition, his formidable strength and success in the trucking industry generally, and his "muscle" methods of closing down competitors and obtaining their customers created a barrier to entry which required that all economic equations based on pure competition be thrown to the wind. His tactics of hiring key employees and sharply cutting existing rates, coupled with his intention to take over every other garment center truckman, with the exception of Gambino and Brody (PX 93, item 7, A.45a), bespeaks a power and influence over the unique garment center world which threatened all other competitors and imposed a most significant barrier to entry.

4. An Illegal Conspiracy Existed

The district court specifically found "that there was sufficient proof from which the jury could have inferred the existence of conspiracy prior to the time when individual defendants left IDC and joined the Walsh group." 618 F.Supp. at 102 (B.29a). This finding was based on the numerous pre-employment contacts the IDC employees had with Mr. Walsh and the acts taken before and after employment. Three of the individual defendants made specific statements, one on the day he quit, that IDC would be eliminated from the market.

The first of the key IDC employees to meet with Walsh and to join his plan was Chuck Hannon. Walsh hired Hannon the weekend of October 8 and 9, 1982, yet Hannon continued to work for IDC for over two weeks. During such time, Hannon admitted he met with Walsh on several occasions, sometimes extensively, to discuss specific details of the Pennsylvania corridor operation, to exchange ideas with Walsh, and to update Walsh on Hannon's progress in aiding Walsh with his plans. Hannon also informed Walsh of the availability of "many people," including Ray Weiss, Mark Tice, and Ken Henning. At some unspecified date, Hannon called Ken Henning to meet in the Poconos to discuss "bettering [his] life." The versions of what took place at this meeting were suspiciously mysterious. The reasonable inference as to why no date for this meeting was provided and for the confusion as to how, why, and in what context NRT was or was not mentioned, is that although Hannon was already working for Walsh he had not yet left IDC, and he and Henning were meeting to discuss Walsh's plan to destroy competition in the market. Other evidence of pre-employment meetings makes reasonable the inference that, by being aware of Walsh's intentions to monopolize the market, and by assisting him in doing so, Walsh's intentions should be imputed to the former IDC employees from the time they first met with Walsh or were recruited by Hannon.

All of the predicate facts were established for the jury to find violations of Sections 1 and 2 of the Sherman Act.

REASONS FOR GRANTING THE WRIT

I. TO ENSURE AN EFFECTIVE AND UNIFORM FEDERAL ANTITRUST POLICY, THIS COURT SHOULD ESTABLISH A CONSIDERED FRAMEWORK FOR ASCERTAINING WHAT PROOF SATISFIES THE "DANGEROUS PROBABILITY" ELEMENT OF THE ATTEMPT TO MONOPOLIZE OFFENSE

Other than to identify the elements of the attempt to monopolize offense, the Supreme Court has provided little guidance in determining what evidence satisfies those elements. The three elements are derived from *Swift & Co. v. United States*, 196 U.S. 375, 396 and 402 (1905): intent to monopolize, anticompetitive acts, and a dangerous probability that the intended result will happen. In the instant case, the courts below have acknowledged that there was sufficient evidence to establish defendants' intention to monopolize and anticompetitive conduct in furtherance thereof. The courts differed on the sufficiency of the evidence in support of a finding of "dangerous probability."

The only clarification provided by the Supreme Court on dangerous probability is found implicitly in *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946), where the Court approved a jury instruction which provided: "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization and which, though falling short, nevertheless approach so close as to create a dangerous probability of it . . . ." The Court in *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951) merely states the rule laid down in *Swift*. In no case has the Court considered the merits of the dangerous probability doctrine in depth. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760 (1984). In *Copperweld*, *dicta*, the Court did, however, recognize that "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." *Id.* at 768.

The Supreme Court has not yet expressly defined what results of intentional anticompetitive acts approach so close to monopolization as to create a dangerous probability of it.[5] The United States Courts of Appeals have all considered the issue and proposed substantially different tests to determine dangerous probability.[6] The Ninth Circuit has explicitly rejected the

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5 This Court has expressly recognized its role in defining illegality under the Sherman Act. The legislative history of the Sherman Act makes it perfectly clear that Congress expected the courts to give shape to the statute's broad mandate. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

6 *George R. Whitten, Jr., Inc., v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 554-555 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (lack of intent coupled with a rise in market share from 2.7% to 3% insufficient); *International Distribution Centers, Inc. v. Waish Trucking Co.; Inc.*, (No. 1280, Aug. 1985 Term, argued May 19, 1986; decided Feb. 24, 1987 2d Cir.) Docket No. 86-7122 (market share analysis essential—50% insufficient in light of ease of entry; other factors included strength of competition, probable development of industry, nature of conduct, and elasticity of demand); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1079-80 (3d Cir. 1978) (lack of intent and market power were determining factors—market share which remained constant at 28% for one year was insufficient in market with five other competitors, each with 5%-26% of the market); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1386-87 (4th Cir. 1974) (market share of 9% insufficient; other factors included: no action taken to expand defendant's market share, increase of supplies to competitors during relevant period); *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1118-19 (5th Cir. 1984), *cert. dismissed*, ___ U.S. ___, 106 S.Ct. 420 (1985) (capacity to commit the offense, character of conduct, intention, defendant and plaintiff's joint market shares, barriers to entry; determination to be made as of time the acts occur); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 991-92 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (drop in market share from over 80% to 38% was sufficient in light of defendant's conduct); *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 507-08 (6th Cir. 1983) (compare defendant's size, performance, and policies to that of competition; dynamic development in the industry precluded finding that 25% market share was sufficient); *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972) (capacity to commit the offense, scope of objective, and character of conduct; one-third of market sufficient (size was "impressive")); *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (market share of about 50% insufficient alone; other factors: whether anticompetitive

requirement of demonstrating a dangerous probability of success where specific intent and anticompetitive conduct is proven, *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 853-55 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) and *William Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982), although even within the Ninth Circuit there has been a lack of uniformity in applying this rule. *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 999 n.13 (9th Cir. 1986), *cert. denied*, 5 Trade Reg. Rep. (CCH) Dkt. No. 86-592 at ¶ 60,021 (Jan. 12, 1987).[7] The Tenth Circuit has explicitly stated that its

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conduct had been ineffective, reasons for prices higher than in other areas, reasons for defendant showing high profits, and barriers to entry); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 999 n.13 (9th Cir. 1986), *cert denied*, 5 Trade Reg. Rep. (CCH) Dkt. No. 86-592, at ¶ 60,021 (9th Cir. Jan. 12, 1987) (dangerous probability element has generated confusion in circuit—held to be an element and not to be an element; market share of 60%-69% sufficient to avoid inquiry on necessity of element); *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 162-64 (10th Cir. 1986) (dangerous probability not a threshold inquiry; same result as 9th Circuit which allows inference of dangerous probability from intent and conduct; market share alone insufficient; other factors include number and strength of competitors, ease of entry by new competitors, consumer sensitivity to change in prices, innovations or developments in market, whether defendant is a multimarket firm); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp., S.A.*, 711 F.2d 989, 996-97 (11th Cir. 1983) (evidence of ability to affect price and the acquisition of the exclusive suppliers suffice to indicate market power); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 428 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 181 (1986) (market power determined in large part by market share; however, defendant's conduct, when predatory *e.g.*, sham litigation, may be sufficient to satisfy market power requirement).

7 Although the Supreme Court has frequently denied petitions for certiorari requesting the Court to review the issue of whether antitrust liability may be imposed for attempted monopolization without a showing of dangerous probability, *see e.g., United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), and *Mobil Oil Corp. v. Blanton*, 721 F.2d 1207 (9th Cir. 1984), *cert. denied*, 471 U.S. 1007 (1985) (Justice White dissented from the denial in an opinion published at 471 U.S.

position is not significantly different from the Ninth's, and it will reach the same result when finding attempt to monopolize. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies*, 783 F.2d 159, 163 (10th Cir. 1986). *See also Telex Corp. v. IBM Corp.*, 367 F.Supp. 258, 343 (N.D. Okla. 1973), *rev'd and affirmed in part*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). The conflict among the Ninth and Tenth Circuits and the other circuits, as well as the inconsistency among the circuits in applying the dangerous probability requirement, implores this Court's clarification.[8]

A. The Court Should Determine Whether the *Per Se* Rules Applicable to Naked Restraints Should be Applied to a Single Firm's Intentional Anticompetitive Behavior Which Serves No Legitimate Purpose

Where conduct is ambiguous and inference is relied upon to establish intention of the actors, the Court has established stringent guidelines to find illegal antitrust activity. *Matsushita Electronic Ind. Co. v. Zenith Radio Corp.*, ____ U.S. ____, 106 S.Ct. 1348 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Where the evidence of intention and pernicious behavior is direct, however, the Court

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1007), we are requesting the Court to review and solve not only the problems unique to the Ninth Circuit's *Lessig* doctrine, but also to create specific judicial guidelines for finding attempt to monopolize which will conform antitrust enforcement in all circuits.

8 Milton Handler, counsel for defendants, has publicly recognized the need for judicial guidance in this area. "What is needed today is clarification, to assure the [dangerous probability] requirement is preserved and to correct the disarray caused by the Ninth Circuit rulings. Happily, the confusion has been confined there; in every other circuit the dangerous probability requirement has been maintained. But the Supreme Court has not addressed the point in thirty years, and the resulting uncertainty should be allayed as soon as possible." [footnotes omitted] Milton Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1353 (1982). *See also* Barry Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1170 (1973) ("the attempt offense remains an important though ill-defined enforcement weapon.")

has held unnecessary the need to conduct elaborate economic industry analysis in restraint of trade cases. *N.C.A.A. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Nat. Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). Similarly, an individual who intends to monopolize a market and takes unambiguous anticompetitive steps, such as predatory pricing, should be found guilty of an attempt to monopolize without extensive analysis of conditions in the relevant market. Where intentional anticompetitive conduct is involved, there is no need to undertake elaborate market analysis to "distinguish robust competition from conduct with long run anticompetitive effects." *Copperweld, supra*, at 2740. Although the Court has yet specifically to limit the need for market analysis in Sherman Act § 2 cases, in *Walker Process Equip. v. Food Mach. and Chem. Corp.*, 382 U.S. 172 (1965), the Court implicitly accepted such a principle when it remanded the case for further clarification of a claim that fraudulent procurement of a patent should be held a *per se* violation of § 2.

The Court has recently confirmed the inherent anticompetitive evil of predatory pricing. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S.Ct. 484, 493 (1986), the Court stated:

> [P]redatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. It is a practice that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice "inimical to the purposes of [the antitrust] laws," *Brunswick*, 429 U.S., at 488, 97 S.Ct., at 697, and one capable of inflicting antitrust injury. [footnotes omitted].

Such pricing is inherently anticompetitive, and in the instant case, resulted in the destruction of IDC and injury to all competitors in the Pennsylvania corridor.

In *F.T.C. v. Indiana Federation of Dentists*, ____ U.S. ____, 106 S.Ct. 2009, 2019 (1986), this Court avoided nominalistic market power inquiries by addressing the consequences of intentional anticompetitive acts and their potential for genuinely adverse effects on competition. The Court stated that " 'proof of actual detrimental effects, such as reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' " (citing 7 P. Areeda, *Antitrust Law*, ¶ 1511, p. 429 (1986)). Under such a rule, a party should be able to demonstrate dangerous probability of successful monopolization by showing evidence of actual control of prices or exclusion of competition from the relevant market, without making inquiry into market shares, barriers to entry, or other surrogates. This position implicitly has been accepted in the Sixth, Seventh, and Eleventh Circuits. *See White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d at 507; *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d at 598; *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp., S.A.*, 711 F.2d at 996-97. We urge the Court to affirm a rule allowing actual evidence of controlling prices or excluding competition to satisfy the dangerous probability element established in *Swift*.

Professors Areeda and Turner suggest adoption of a *per se* rule finding attempted monopolization without proof of market power. P. Areeda and D. Turner, *Antitrust Law*, ¶ 836 (1978). Although they carefully limit the type of conduct to which the rule should apply, they specifically recommend that it apply to predatory pricing: "a particularly good example, for such pricing is itself proof that the firm, if not already possessing a degree of market power, anticipates obtaining it."

Id. at 353.[9] Had the Second Circuit applied such a rule, the evidence of intention and anticompetitive acts, including predatory pricing, acquisitions, unmeritorious hiring of competitors' employees, and destruction of IDC, would have required it to sustain the jury's verdict and the trial judge's determination on the dispositive motions.

B. Alternatively, the Court Should Adopt a Sliding Scale Approach for Demonstrating the Elements of Attempt to Monopolize

Less stringent than the limited *per se* rule described above is a sliding scale rule. This rule takes into account all three elements of the attempt offense: intention, anticompetitive conduct, and dangerous probability, and weighs their respective relevance according to the quantum of proof offered in support of the other two elements.

For example, in the case at bar, where intention and anticompetitive conduct are indisputably proven, the need for market power inquiry would be substantially reduced. The logic behind this rule is that where an actor seeking monopolization intentionally engages in anticompetitive conduct, a trier of fact is not able to judge probability of success any better than the actor himself. Unless it is premised that the actor temporarily has taken leave of his senses, his degree of monopoly power attained should not be determinative in halting the conduct. Conversely, where there is minimal evidence of intent or anticompetitive acts, close market analysis should be conducted to ensure that uncertain conduct which may in fact be

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9 Professor Areeda has also recognized that: "[d]efining markets and determining the presence of market power is not socially costless. Using up the time and energy of courts and lawyers wastes resources when the challenged conduct of a pernicious type lacks any offsetting legitimate objective. Moreover, complicating and perhaps forestalling the condemnation of such conduct weakens deterrence of such unredeemed behavior. Further, the defendants have little moral standing to demand proof of power or effect when the most they can say for themselves is that they tried to harm the public but were mistaken in their ability to do so." 7 P. Areeda, *Antitrust Law*, ¶ 1509 (1986). Should the Court of Appeals' decision go unreviewed, all of Professor Areeda's fears will be realized.

procompetitive is not chilled by application of the Sherman Act.

Either the "*per se*" or "sliding scale" approaches would provide more certain guidelines by which the circuit courts may determine whether unilateral conduct should be found illegal under Section 2 of the Sherman Act. The dangerous probability enigma has been in need of clarification since it was first articulated in *Swift & Co. v. United States*, 196 U.S. 375 (1905).

The Sherman Act is not an economic tinker toy for the courts, but a solemn declaration of rights and obligations found in a "charter of freedom." *Appalachian Coals v. United States*, 288 U.S. 344, 359 (1933). Congress, without restricting the words "attempt to monopolize," exercised the fullest power granted it by the Commerce Clause. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945).

II. THE REVIEW AND COMPARTMENTALIZATION OF THE EVIDENCE BY THE CIRCUIT COURT IN A MANNER CONSISTENTLY ADVERSE TO PETITIONER IS A GROSS AND INTOLERABLE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The Petitioner was denied its right to a jury trial when the Circuit Court with lighthearted abandon used whatever facts supported its view while ignoring others. Petitioner fully realizes that this Court normally will not grant certiorari for review and/or correction of evidentiary matters. Petitioner submits that, in this case, important and far-reaching questions are presented, which must not be decided *in vacuo* or on the Second Circuit's remoteness from the facts as found by the jury. We urge this Court to reaffirm the integrity of a jury trial and the proposition that a court determining or reviewing a motion for a judgment notwithstanding the verdict must view all the evidence and all reasonable inferences which can be drawn from the evidence in the light most favorable to the resisting party.

A. The Court of Appeals Misstated the Principal Issue of the Case

The Court of Appeals' ruling is unsupportable, is damaging to antitrust enforcement, and ignores the anticompetitive effect respondents' conduct had on the GOH Pennsylvania Corridor Market. The Court of Appeals, in the second paragraph of its decision, has stated the principal issue in such a way as to make inevitable a result adverse to Petitioner, while at the same time misstating or omitting to state the evidence upon which the jury findings were based.[10] The court hinges dangerous probability of monopolization on an arbitrarily limited view of defendants' intent. While the court in its opinion recognizes defendants' intent is to monopolize the entire market (A.5a and 8a), its analysis of the principal issue to be resolved limits defendants' intention merely to driving a competitor from the market. The issue also presumes that the firm will not possess significant market share even if "the competitor is driven out of business." But the "firm" has no limitation on its appetite confining its market position to the position occupied by the competitor and, indeed, the evidence shows that the "firm" has taken customers and employees from other competitors and has acquired and put out of business significant competitors totally unrelated to IDC. The court's statement of the principal issue on appeal foreshadows its reversal because it limits defendants' possibility for market power to one-half of the market and nothing more. The evidence is to the contrary and should have been accepted by the Court of Appeals.

B. The Court of Appeals Drew Improper Conclusions Regarding Barriers to Entry and Competitors' Prices

The Court of Appeals concluded that had NRT raised its prices to recoup its losses from predatory pricing, "competitors

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10 The court found the principal issue on appeal to be "whether there can be a dangerous probability that a market will be monopolized where one firm in the market has the specific intent to drive a competitor from the market and has engaged in an arguably tortious activity to achieve the objective but does not have significant market power and will not possess such power even if the competitor is driven out of business." (A.3a).

from outside the market could easily have surmounted any barriers to entry and competed with NRT for business in the Pennsylvania Corridor." (A.12a). The court went on to recognize that "the issue of barriers to entry is disputed." *Id.* As outlined in the Statement of the Case above (p. 10), substantial evidence of entry barriers was presented. Further, there was direct evidence from an outstanding unimpeached transportation expert, Dr. Irwin Silberman, who conducted a limited poll of competitors from outside the market showing that less than truckload GOH trucking was incompatible with their operations. Dr. Silberman gave specific reasons why they would not truck GOH in the Pennsylvania corridor. He also showed that change in the I.C.C. regulations did not have a liberating effect in the LTL market. In face of this evidence, the Circuit Court's conclusion, that competitors from outside the market would enter if Walsh raised his prices, was both improper and incorrect.

Similarly there was conflicting evidence on whether NRT's prices were lower than all of the competitors in the market. The Court of Appeals concludes that "NRT's 1983 tariffs were already above those of at least three of its other competitors in the Pennsylvania Corridor." (A.12a). This conclusion ignores the substantial evidence that tariff comparisons were demonstrated to be meaningless because their differing structures make them uncomparable, and that customers switched to NRT because it was cheapest. If competitors in the market were cheaper, the customers would not have gone to NRT.

The Court of Appeals also gave undue weight to the defendants' side of the disputed evidence of barriers to entry. The court conducted no analysis of the four other market characteristics it specifically stated were relevant to determining dangerous probability: strength of the competition, the probable development of the industry, the nature of the anticompetitive conduct, and the elasticity of consumer demand (A.11a). A review of the evidence of these characteristics, as shown in the Material Facts above (pp. 9-10), indicates that defendants had a dangerous probability of being able to control prices and

exclude competition from the GOH Pennsylvania Corridor Market.

The fact that the jury was unambiguously instructed on dangerous probability and ease of entry, coupled with the fact that its conclusion finds support in "expert testimony and anecdotal evidence," requires this Court to review the evidence and affirm the jury's verdict. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 2859 (1985).

C. The Court of Appeals Incorrectly Concluded the Only Anticompetitive Conduct was Predatory Pricing

The record is replete with direct evidence of defendants' anticompetitive behavior which was expressly undertaken to destroy competition. The Court of Appeals' statement that a "careful search of the record reveals no evidence of other anticompetitive conduct [than predatory pricing]" shows the court's improper fragmentation of the evidence. (A.17a). Acquisitions of competitors, hiring of competitors' employees, forcing customers to switch carriers overnight, taken separately all may be legitimate conduct. When put in the framework of expressed intention to monopolize, however, all of those acts rise to the level of illegal anticompetitive behavior. The court's failure to consider this evidence when weighing the inference of a conspiracy, necessarily flawed its conclusion. A broader reading of the record would have caused a different result below.[11]

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11 Support for this conclusion is found in footnote 7 of the Court of Appeals' opinion, where the court stated that had the jury found that the alleged conspirators misappropriated trade secrets, the court might have altered its decision on conspiracy. Walsh acquired key employees. IDC alleged they took with them "trade secrets," but the jury found otherwise and so IDC's separate state tort claims were dismissed. But in reference to monopoly, it makes no difference whether the customer lists and knowledge of customers' purchasing needs were trade secrets. In many instances the "key employees" used the persuasive power of their customer relationships, shaped at IDC, for an immediate customer raid which, as Walsh planned, proved to be an important step toward monopolization.

The Court of Appeals has usurped the jury's function by searching the record for conflicting evidence and taking the case away from the jury on a theory that the proof gave equal support to inconsistent and uncertain inferences regarding dangerous probability and conspiracy, contrary to this Court's mandate in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Petitioner submits that the Court of Appeals' failure to follow the proper rule relating to appellate review is, in the circumstances of this case, a compelling reason to issue a writ of certiorari.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARDS IN ITS EVALUATION OF INFERENCES EVIDENCING A CONSPIRACY BETWEEN WALSH AND THE IDC DEFENDANTS

The Court of Appeals' rejection of IDC's conspiracy claims demonstrates that the Second Circuit missed the lesson taught by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). In *Copperweld*, the Court cautioned that what may appear to be an intraenterprise conspiracy is often an interenterprise conspiracy. In fact, the Walsh-IDC defendants' conspiracy presents just such a case. Although much of the illegal conspiratorial behavior occurred after the IDC individual defendants joined Walsh, the evidence demonstrates that the illegal activity began before such affiliation occurred. In misconstruing the teaching of *Copperweld*, the Second Circuit refused to find any violation of the federal antitrust laws in post-affiliation conduct, as if this affiliation had acted as a purge or redemption of prior conduct. Such a conclusion simplifies *Copperweld* in the manner the majority explicitly stated was incorrect. 467 U.S. at 761, and n.5.

In *Copperweld*, this Court found that post-affiliation conduct is relevant in determining the significance of the affiliation itself. Specifically, if an original anticompetitive purpose is

evident from post-affiliation conduct, the fact of the affiliation is irrelevant for purposes of Section 1 liability because the original actions themselves are illegal. *Id.* "An affiliation 'flowing from an illegal conspiracy' [can]not avert sanctions" since the initial anticompetitive conduct is a predicate for intraenterprise violations of the Sherman Act. *Id.*

A. Pre-Affiliation Conduct

There is no doubt that before the IDC defendants became Walsh employees, Walsh engaged in a pattern of intentionally anticompetitive acquisitions. Such acquisitions included trucking companies and, as with IDC, the trucking companys' key employees. The IDC defendants assisted Walsh in carrying out his anticompetitive intent. The Court of Appeals, by stating that an agreement by the IDC defendants "to assist Walsh in waging a predatory price war" required the "remarkable assumption that Walsh would disclose details of his predatory pricing war to the IDC defendants while they were still key IDC employees" (A.18a), completely overlooks the fact that Frank Walsh announced his plans to Mr. Eskow, the President of IDC, at a time when three of the key defendant employees were still employed by IDC. Moreover, at the time the IDC employees were being recruited to join Walsh, NRT's duly filed tariff showed that its rates were 20-30% lower than the rates charged by IDC. Knowledge of a duly filed tariff is presumed. These experienced truckers in conversations with Walsh as to what they were expected to do must have known that they would sell at Walsh's established prices which were then, and later, predatory.

A most persuasive point is that the IDC defendants admitted that they talked to their friends at IDC and warned them of IDC's imminent destruction and that, consequently, it was in their interest to move to Walsh. The intentional attachment of the IDC defendants to Walsh's illegal scheme is, therefore, directly and indirectly supported by the record evidence and specifically admitted by certain individual defendants who had been IDC employees.

B. Post-Affiliation Conduct

The defendants' anticompetitive purpose was shown in systematic and unrelenting raids conducted on key IDC employees. Correlatively, these former IDC employees at once made saturation solicitations of IDC's customers offering them Walsh's predatory prices to transfer their business to Walsh.

Direct evidence of the employee raid is manifest in the IDC defendants' admitted solicitation of one another for NRT employment, in their clear warnings given their friends at IDC directly after attending meetings with Walsh, and in their successful hiring/solicitation of more than thirteen other IDC employees for Walsh. The implementation of the raid on IDC customers was pursued with similar tenacity; defendant Weiss testified that of the "thousands and thousands" of potential Garment Center customers for the Pennsylvania corridor, he went after as many IDC customers as he could, some even before he left IDC. Defendants Henning and Hannon also admitted soliciting IDC customers; in fact, Hannon admitted that in January 1983 he solicited *only* IDC customers. Finally, defendants Tice and Henning bragged that IDC would be eliminated from the market. Thus, in contrast to the Court of Appeals' finding that the IDC defendants' solicitation of IDC employees and customers reflected "nothing more than effective performance of their duties as NRT employees" (A.19a), the record clearly establishes that this solicitation was actually part of Walsh's plan to secure a monopolistic position in the market.

C. Plausability of the Anticompetitive Conspiracy

The Court of Appeals' decision misapplies a rule, limiting inferences of conspiracy, laid down in *Matsushita Electronic Indus. Co. v. Zenith Radio Corp.*, ____ U.S. ____, 106 S.Ct. 1348 (1986). Imprecisely applying the stringent standards of *Matsushita* to justify its result, the court ignores the complete factual differences between the two cases which precludes the use of *Matsushita* as a precedent here. The conspiracy in *Matsushita* was totally different from the Walsh-IDC defend-

ants' conspiracy. The market was the entire United States, the conspirators would have had to include 21 corporations, and the conspiracy would have had to last 30 years to recoup the losses. *Id.* at 1357-60 and n.15. The instant case, however, presents a situation in which a predatory pricing conspiracy could reasonably be pursued. The record evidence clearly establishes that Walsh possessed both the intent and economic power necessary to monopolize the GOH Pennsylvania Corridor Market. Defendants' conspiracy is the more plausible because the plan *did* result in an appreciable decline in IDC's share of the market and Walsh was provided with the motive to endure the inevitable short-term losses inherent in any predatory pricing scheme. The Court of Appeals erroneously applied *Matsushita* to this case in which predatory pricing, albeit illegal, made good economic sense.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1280—August Term, 1985

(Argued: May 19, 1986 Decided: February 24, 1987)

Docket No. 86-7122

INTERNATIONAL DISTRIBUTION CENTERS, INC.,
Plaintiff-Appellee.

— v. —

WALSH TRUCKING CO., INC., COASTAL FREIGHT LINES, INC., HEMPSTEAD DELIVERY CO., INC., NATIONAL RETAIL TRANSPORTATION INC., FRANCIS J. WALSH, JR., KENNETH B. HENNING, MARK S. TICE, RAYMOND WEISS, CARMINE SABATINI and CHUCK HANNON,
Defendants-Appellants.

Before:

OAKES, MESKILL and MAHONEY,
Circuit Judges.

Appeal from the second amended judgment of the United States District Court for the Southern District of New York, Keenan, *J.*, following a jury verdict for the plaintiff, the denial of the defendants' motion for judgment notwithstanding the verdict and the court's entry of a permanent injunction and order for attorneys' fees. The defendants were adjudged to have attempted to monopolize, conspired to monopolize and conspired to restrain trade in the market for carriage of garments on hangers among garment manufacturers, suppliers, contractors and retailers "along the New York, New Jersey, Pennsylvania route," in violation of 15 U.S.C. §§ 1, 2 (1982).

Reversed and remanded.

STANLEY D. ROBINSON, New York City (Milton Handler, Gerald Sobel, Randolph S. Sherman, Alan F. Goott, John W. Schryber, Kaye, Scholer, Fierman, Hays & Handler, New York City, Marc L. Zoldessy, General Counsel, National Retail Systems, Inc., North Bergen, New Jersey, of counsel), *for Appellants.*

MALCOLM A. HOFFMANN, New York City (Peter L. Altieri, Lisa A. Frey, New York City, George J. Hayward, General Counsel, International Distribution Centers, Inc., North Bergen, New Jersey, of counsel), *for Appellee.*

MESKILL, *Circuit Judge*:

This is an appeal from the second amended judgment of the United States District Court for the Southern District of New York, Keenan, *J.*, following a jury verdict for the plaintiff, International Distribution Centers, Inc. (IDC), the denial of a motion by National Retail Transportation, Inc. and other individual and corporate defendants (collectively referred to as NRT) for judgment notwithstanding the verdict and the court's entry of a permanent injunction and order for attorneys' fees. The judgment held that NRT had attempted to monopolize, conspired to monopolize and conspired to restrain trade in the market for the carriage of garments on hangers among garment manufacturers, suppliers, contractors and retailers "along the New York, New Jersey, Pennsylvania route," in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2 (1982). Treble damages in the amount of $38,261,967 were awarded to IDC.

The principal issue on appeal is whether there can be a dangerous probability that a market will be monopolized where one firm in the market has the specific intent to drive a competitor from the market and has engaged in arguably tortious activity to achieve that objective but does not have significant market power and will not possess such power even if the competitor is driven out of business. We conclude for reasons set forth below that no such probability can exist in these circumstances. We decline to eliminate such probability as a prerequisite for the recovery of damages for attempted monopolization. We, therefore, reverse the judgment below and remand to the district court with instructions to enter judgment for NRT.

BACKGROUND

NRT and IDC are truckers operating in the less-than-truckload (LTL) segment of the garment transportation industry.[1] They pick up quantities of goods from individual shippers, consolidate and sort the loads according to destination, carry the full loads to a distribution center, break the loads down and deliver the small lots to their final destination. IDC transports raw materials and garments on hangers between the garment district in New York City and contractors located primarily in eastern Pennsylvania. NRT also carries garments on hangers in this geographical market, which has been identified in this litigation as the "Pennsylvania Corridor."

The structure of the market for the carriage of garments on hangers in the Pennsylvania Corridor changed during the years preceding this litigation. In 1982, IDC estimated that it was carrying less than fifty percent of the garments that it had handled in 1975 and projected that there would be a continuing decline in the total volume of garments on hangers transported by truck into the Pennsylvania Corridor. For some reason the market improved

[1]NRT also operated as a "truckload" or "line haul" carrier, carrying full truckloads from the shipper's place of business to the final destination. This case only concerns NRT's less-than-truckload operations.

This opinion refers to IDC and NRT in the present tense even though the record and the appellate briefs indicate that both firms have begun proceedings under Chapter 11 of the Bankruptcy Code. On January 9, 1987, the United States Bankruptcy Court for the District of New Jersey, Gindin, *J.*, modified, effective September 6, 1985, the automatic stay as it extends to Walsh and the corporate defendants for purposes of permitting the continued prosecution of this appeal. The automatic stay resulting from IDC's petition does not affect our jurisdiction because, as to IDC, this appeal is not a proceeding "against the debtor" within the meaning of section 362. *Commerzanstalt* v. *Telewide Systems, Inc.*, 790 F.2d 206, 207 (2d Cir. 1986) (per curiam).

somewhat in 1983 and IDC estimated that it had a fifty percent market share in the Pennsylvania Corridor in that year.

NRT, which was already operating in other markets, did not begin carrying garments on hangers in the Pennsylvania Corridor until January 1983. In order to expand its operations to include carrying garments on hangers in the Pennsylvania Corridor, NRT had to modify vans by installing metal bars or nylon ropes, lease terminals for its distribution network and train personnel in the rudimentary techniques of processing garments on hangers for carriage and distribution.

In late 1982, NRT's preparations to enter the Pennsylvania Corridor included the hiring of several disaffected IDC employees. IDC's president and chief executive officer, Gerald Eskow, was concerned enough about the incipient employee "raid" to request a meeting with Francis Walsh, his counterpart at NRT. At trial the two men gave dramatically different accounts of that meeting. We read both accounts in the light most favorable to upholding the jury's verdict. The meeting occurred in Walsh's office on November 3, 1982. Walsh confided at the meeting that "he was determined to completely obliterate IDC," that "he was particularly thrilled with the prospect of destroying Jerry Eskow" and that "he couldn't wait to mount [Eskow's] head on his wall." J. App. at 335-36.

Walsh told Eskow he had a plan for obliterating IDC and monopolizing the carriage of garments on hangers in the Pennsylvania Corridor. Walsh had first tried to buy out IDC. When that failed, he began hiring several of IDC's key employees to destroy its "credibility" and planned to start a price war to put IDC in a " 'no-win' situation." J. App. at 333-34.

In the wake of this declaration, IDC filed suit against NRT on December 29, 1982. IDC alleged, *inter alia,* that NRT had attempted to monopolize the carriage of garments on hangers, had conspired to monopolize the carriage of garments on hangers, had conspired to restrain trade and had wrongfully appropriated IDC's trade secrets. IDC obtained a preliminary injunction prohibiting NRT's further hiring of IDC employees and use of its trade secrets.

Trial of the case began in June 1984. IDC's theory of the case revolved around Walsh's purported plan to obliterate IDC. It attempted to prove the antitrust and trade secret claims in that context. NRT contended that it was only trying to promote competition. It argued that IDC was run by an incompetent president who was using the lawsuit to protect IDC's share of the Pennsylvania Corridor market.

NRT sought to defeat the antitrust claims by demonstrating that there was not a "dangerous probability" that NRT could successfully monopolize the Pennsylvania Corridor. *See Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.,* 651 F.2d 76, 85 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982). It attempted to prove, for example, that several trucking firms had expanded into and were competing in the relevant market, that numerous firms could easily enter the market and thus that NRT would not be able either to control prices or to restrain competition even if IDC went out of business. NRT also attempted to prove that it lacked sufficient market power to make monopolization of the market probable.

After six weeks of trial and two days of deliberation, the jury returned a verdict for IDC on all three antitrust

claims and a verdict for NRT on the trade secrets claim. NRT's motion for judgment notwithstanding the verdict was denied by the court in an opinion filed June 20, 1985. This appeal followed further proceedings that are not directly relevant here.

NRT frames its appeal as an attack on the sufficiency of the evidence to support the verdict against it. It claims that there was insufficient evidence that NRT (1) attempted to monopolize the market for the carriage of garments on hangers in the Pennsylvania Corridor, (2) conspired to restrain trade in that market, and (3) conspired to monopolize that market. We address these claims in order.

DISCUSSION

A. *Attempt to Monopolize*

Liability for attempted monopolization rests on proof of three elements: (1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a "dangerous probability" that the attempt will succeed. *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d at 85; *see also* 3 P. Areeda & D. Turner, Antitrust Law, ¶ 820 at 312 (1978). The heart of NRT's argument on this appeal is that there was not a dangerous probability that it would monopolize the market for the carriage of garments on hangers in the Pennsylvania Corridor. IDC responds by arguing not that there was sufficient evidence to demonstrate such a probability, but rather that when anticompetitive acts and specific intent to monopolize are "clearly proven" then "little more is needed to establish the offense." Br. of Plaintiff-Appellee at 15 (citations omitted).

For purposes of our analysis, we will presume that there was sufficient evidence to establish that NRT engaged in some form of anticompetitive conduct and had the specific intent to monopolize the Pennsylvania Corridor.[2] The question remains whether even strong evidence of these two elements was sufficient to allow the jury to infer that there was a dangerous probability that the market would be monopolized by NRT.

IDC relies on a line of cases from the Ninth Circuit that allow the jury to infer the existence of such a dangerous probability from proof of the other two elements. *See, e.g., Janich Brothers, Inc.* v. *American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). *Lessig* is the progenitor of this line and, as one academic has noted, it has had a "remarkably checkered career even in the Ninth Circuit." Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373, 420 & nn.168-74 (1974); *see also United States* v. *American Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984). We implicitly rejected the *Lessig* standard on an earlier occasion. *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). For reasons more fully explained below, we explicitly reject it here.

IDC next argues that "dangerous probability" relates to

[2]As a result, we need not inquire whether (1) IDC had the burden of proving that NRT's prices were below NRT's reasonably anticipated marginal costs, or (2) NRT had the burden of rebutting IDC's proof that NRT's prices were below NRT's average variable costs by coming forward with evidence that those prices were above NRT's reasonably anticipated marginal costs. *Compare* Br. of Defendants-Appellants at 40-44 *with* Br. of Plaintiff-Appellee at 26-27 & n.15.

the substantive crime of monopolization and should be irrelevant to an *attempt* to monopolize. It maintains that requiring proof of NRT's dangerous probability of monopolizing the relevant market is like requiring proof that five floors of a ten story building had burned to sustain a conviction for attempted arson.

IDC's analogy is inapposite. The actual burning of any small part of a building transforms attempted arson into the substantive crime, while an actual effect on some small part of a market does not amount to monopolization of the market. IDC's analogy is not helpful in determining how the law should distinguish between the attempt to monopolize, which reaches further than the proscription against monopolization, *Northeastern Telephone*, 651 F.2d at 85, and the completed act of monopolization.

Moreover, IDC's argument ignores the history of judicial interpretation of the term "monopoly" as it relates to both the substantive act and the attempt. We have consistently interpreted both monopoly and the attempt to monopolize as requiring some measure of market power.[3] *See, e.g., id.* at 84 ("monopoly power is the essence of a § 2 violation"); *id.* at 85 (proof of unlawful conduct "*when coupled with* proof of monopoly power . . . may satisfy the requirement that the attempt [to monopolize] have a 'dangerous probability of success' ") (emphasis added); *see also* 3 Areeda & Turner ¶ 833d at 341. We see no reason to reject that requirement.

Eliminating the dangerous probability element from

[3] "Market power" is a synonym for "monopoly power." We have previously defined "monopoly power" as "the power to control prices or exclude competition . . . in the relevant market." *Broadway Delivery Corp. v. United Parcel Service, Inc.*, 651 F.2d 122, 126-27 (2d Cir. 1981).

attempted monopolization would have the effect of extending the coverage of section 2 of the Sherman Act to similar behavior already covered by state and federal law. The Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1982), regulatory statutes and state business tort law all reach anticompetitive behavior by firms that lack market power. Civil RICO may have also expanded into this area. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 53 U.S.L.W. 5034, 5036-38 (U.S. July 1, 1985) (corporation suing joint venturer for violation of 18 U.S.C. §§ 1961-68 (1982) need not establish that defendant had been convicted of predicate act and need not prove "racketeering injury"). There is no unmet need calling for judicial expansion of section 2 to reach similar behavior. *See* 3 Areeda & Turner ¶ 833d at 341.

Furthermore, any significant reduction in the antitrust plaintiff's burden of proving that the defendant has a dangerous probability of monopolizing the market might discourage the healthy competition that section 2 is intended to nurture, *see id.* at 342, and deter businesses from aggressively expanding into new markets. Existing firms that lost market share to a newcomer could seize upon some hiring or marketing tactic, label it "anticompetitive" and then recover treble damages and attorneys' fees. *See, e.g., Gerber Products Co.* v. *Beech-Nut Life Savers*, 160 F.Supp. 916, 918 (S.D.N.Y. 1958) (plaintiff with 73% share of relevant market for baby food sued defendant with 4.3% share for attempted monopolization, alleging that "puffing" of baby food in glass jars and price reduction to meet plaintiff's price were anticompetitive acts). Surely the potential liability from such a suit would cast a long shadow over business planning.

We, therefore, adhere to the traditional rule that an action under section 2 of the Sherman Act for attempting

to monopolize a market will lie only where there is anti-competitive conduct, a specific intent to monopolize *and* a dangerous probability that monopoly will be achieved. A dangerous probability of monopoly may exist where the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct. *See* 3 Areeda & Turner ¶ 835a at 346.

We note that market share analysis, while essential, is not necessarily determinative in the calculation of monopoly power under this standard. Other market characteristics must also be considered in determining whether a given firm has monopoly power or has a dangerous probability of acquiring monopoly power. *Cf.* Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1174 (1973) ("The dangerous probability requirement should be retained since it complements the behavioral element of the offense as the vehicle by which the defendant's market power and other structural factors are evaluated."). Among these characteristics are the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand. *See Hayden Publishing Co.* v. *Cox Broadcasting Corp.*, 730 F.2d 64, 68-69 (2d Cir. 1984) (discussing some of these factors); *Broadway Delivery Corp.* v. *United Parcel Service*, 651 F.2d 122, 128 (2d Cir.) (same) (citing *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527 (1948)), *cert. denied*, 454 U.S. 968 (1981).

Applying this standard, NRT was entitled to a judgment notwithstanding the verdict. *See Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 951-52 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982). Viewing the evidence

in the light most favorable to IDC, there is only one reasonable conclusion as to the proper verdict. On this record, the jury could not reasonably have found that there was a dangerous probability that NRT would monopolize the market for the carriage of garments on hangers in the Pennsylvania Corridor without engaging in speculation. One year after entering the market, NRT had no more than a seventeen percent share of the carriage of garments on hangers in the Pennsylvania Corridor.[4] Even if NRT drove IDC out of business and took over *all* of IDC's accounts, NRT would still have a market share of no more than fifty percent. It is unlikely that even with a fifty percent market share NRT could raise prices without losing business to the several other trucking firms that had been unaffected by NRT's employee raids or alleged predatory pricing. The evidence at trial indicated that NRT's 1983 tariffs were already above those of at least three of its other competitors in the Pennsylvania Corridor.

Assuming *arguendo* that NRT could have cannibalized IDC, appropriated *all* of its customers and obtained sufficient power to raise prices in the market temporarily, the competitors from outside the market could easily have surmounted any barriers to entry and competed with NRT for business in the Pennsylvania Corridor. Although the issue of barriers to entry is disputed, there was undisputed evidence that a new carrier had in fact entered the

[4]NRT maintains that it only had 10% of the market. IDC maintains that NRT's market share was closer to 17%. NRT hypothesizes that IDC still had a 33% share of the market in 1984. The record is unclear as to whether either party presented market share calculations to the district court, but both IDC and NRT have used evidence that was properly admitted at trial to make the calculations contained in their appellate briefs and we rely on those calculations. Viewing the evidence in the light most favorable to the verdict, we assume that IDC established that NRT enjoyed a 17% market share in 1984.

market during 1983 and that several existing carriers had expanded their operations into the market during 1983 and 1984.

This evidence of new entries and expansion is consistent with Department of Justice comments to the Interstate Commerce Commission on January 17, 1983, a certified copy of which was admitted into evidence at trial. The Justice Department observed that entry into the LTL segment of the trucking business requires capital expenditures. It noted, however, that "these capital outlays, though relatively large for the trucking industry, still do not approach the entry costs in other industries." J. App. at 644. The Department went on to note that when existing carriers expand into a new market, they have lower entry costs than new carriers "primarily due to their expertise in the trucking business, their ability to shift some existing assets to new locations at minimal cost, and their ability to use existing terminals or break-bulk stations as the core of an expanded service territory." *Id.* at 645.

Under the conditions in the market for the carriage of garments on hangers in the Pennsylvania Corridor, therefore, NRT's market share was not sufficiently significant to give rise to a dangerous probability that it would monopolize the market even when its anticompetitive conduct is taken into account. A jury could not reasonably find that such a probability existed without engaging in speculation concerning matters not in evidence.

Thus, we conclude that IDC failed as a matter of law to establish that NRT, which had at most a seventeen percent market share one year after it entered an intensely competitive market with low entry barriers, had a dangerous probability of successfully monopolizing that market.

Our conclusion is supported by the majority of cases with similar facts finding no dangerous probability of a monopoly. *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270-71 (7th Cir. 1981) (30% market share, no significant barriers to entry), *cert. denied*, 455 U.S. 921 (1982); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (33% market share, defendant's share continuously declining); *Yoder Brothers, Inc.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1368-69 (5th Cir. 1976) (20% market share in highly competitive market with low barriers to entry), *cert. denied*, 429 U.S. 1094 (1977); *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 971-72, 974-75 (8th Cir. 1968) (20% market share in highly competitive market); *cf. United States* v. *Waste Management, Inc.*, 743 F.2d 976, 983-84 (2d Cir. 1984) (projected 48.8% market share of corporation after proposed merger insufficient to support finding that merger would violate section 7 of the Clayton Act where the barriers to new entry were insubstantial).

B. *Conspiracy Claims*

1. *Section 1 Claim*

To sustain a claim of conspiracy to restrain trade under section 1 of the Sherman Act, IDC must establish (1) that NRT entered into a "contract, combination ... or conspiracy", and (2) that the conspiracy was "in restraint of trade or commerce among the several States." 15 U.S.C. § 1; *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 78 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981). Unlike the proof required to establish a conspiracy to monopolize under section 2, a specific intent to create a monopoly is not required under section 1. At a minimum, however, " 'the circumstances [must be] such as to war-

rant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement,'" *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.) (quoting *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946)), *cert. denied*, 429 U.S. 885 (1976), and that the anticompetitive effects of the alleged conspiracy outweigh its procompetitive effects. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691 (1978). In this context, it should be emphasized that Congress enacted the Sherman Act to protect competition, not competitors. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Defendants argue that the evidence before the jury was insufficient as a matter of law to permit an inference of a conspiracy to unreasonably restrain trade.[5] Evidence of a conspiracy should not be "fragmented;" it must be viewed as a whole to determine the reasonableness of inferences drawn by the jury. *Matsushita Electronic Indus. Co.* v. *Zenith Radio Corp.*, 54 U.S.L.W. 4319, 4325 (U.S. Mar. 26, 1986) (White, *J.*, dissenting) (citing *Continental Ore* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962)). We must determine, therefore, whether the totality of the evidence, viewed most favorably to the plaintiff, was suf-

[5]We note as a preliminary matter that any conspiracy relevant here would have had to begin before Walsh and NRT hired defendants Henning, Tice, Weiss, Sabatini or Hannon. Once these defendants and Walsh became "officers or employees of the same firm[, they could] not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (citing, *inter alia*, *Schwimmer*, 677 F.2d at 953). After joining NRT, any concerted activity between any of these defendants and Walsh could not "represent a sudden joining of two independent sources of economic power previously pursuing separate interests . . . that warrants § 1 scrutiny." *Copperweld*, 467 U.S. at 771.

ficient to support the jury's verdict. *Venture Technology, Inc.* v. *National Fuel Gas Co.*, 685 F.2d 41, 45 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982), *reh'g denied*, 459 U.S. 1138 (1983).

The Supreme Court recently reaffirmed that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct." *Matsushita*, 54 U.S.L.W. at 4324. We have overturned jury verdicts where, "taken as a whole, the evidence point[ed] with at least as much force toward unilateral actions by [the defendants] as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion." *Venture Technology*, 685 F.2d at 48. *See also Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 951-52 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982).

Affording plaintiff every reasonable inference, the record reveals the following: Francis Walsh, NRT's president, planned to "obliterate" IDC. Walsh intended to hire away IDC's "key" executives to undermine its credibility, initiate a price war to destroy Walsh's "enemy," and then "discharge the executives he seduced" after the enemy was "annihilated." J. App. at 333-34. Plaintiff theorizes that these key executives—defendants Henning, Tice, Weiss, Sabatini and Hannon (hereinafter collectively referred to as "IDC defendants")—knew before being hired by NRT about Walsh's plan to wage a predatory price war and agreed to join in its execution. Although there was no direct evidence of such a pre-employment agreement, plaintiff would infer one from meetings between Walsh and the IDC defendants and their post-employment conduct.

In the fall of 1982, the IDC defendants met with Walsh while they were still employed by IDC. IDC defendant Hannon, before and after the meeting, successfully solicited several IDC employees to join NRT. In addition, Hannon and Walsh met several times in the two week period after Hannon had accepted a job with NRT but before he had left IDC. The record also reveals that the other IDC defendants successfully solicited important IDC workers to join NRT, and convinced many substantial IDC customers to switch to NRT. The jury found that IDC incurred substantial losses and that NRT had engaged in predatory pricing.

The district judge upheld the jury's finding that defendants engaged in anticompetitive conduct solely by relying on the jury's determination that defendants engaged in predatory pricing. J. App. at 109-10. A careful search of the record reveals no evidence of other anticompetitive conduct. Our inquiry, therefore, is confined to whether there was sufficient evidence that the IDC defendants collaborated in the predatory pricing scheme.

Plaintiff produced sufficient evidence to give rise to a reasonable inference that Walsh himself intended to unreasonably restrain trade. That is not enough, however. A section 1 conspiracy requires a *plurality* of actors agreeing to restrain trade. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 n.13, 768 (1984). Taken as a whole, plaintiff's evidence simply does not give rise to a reasonable inference that any of the IDC defendants agreed to assist Walsh in waging a predatory price war, or to do anything else except work for him.

The jury's contrary conclusion required impermissible speculation. *See Oreck Corp.*, 639 F.2d at 80 (sheer speculation insufficient to sustain antitrust conspiracy viola-

tion). It required the assumption that as of late October 1982, Walsh had agreed with Hannon and/or the other IDC defendants on the details of the scheme to destroy IDC. It required the remarkable assumption that Walsh would disclose details of his predatory pricing war to the IDC defendants while they were still key IDC employees. These assumptions completely lack factual foundation.

In reaching this conclusion, we emphasize that the evidence must be evaluated in the context of the pending employer/employee relationships between Walsh and the IDC defendants.[6] The pre-employment meetings between Walsh and the IDC defendants were just as likely held to discuss their future employment relationship as to hatch a predatory pricing scheme.[7] IDC employees testified that they were well aware of the company's financial woes. Thus, the IDC defendants' solicitations of other IDC employees would reflect normal co-worker conversations regarding each other's employment prospects at least as much as they reflect an agreement to unreasonably restrain trade. *See Matsushita,* 54 U.S.L.W. at 4322-23, 4325 (purely equivocal evidence does not give rise to an inference of illegal conspiracy). The IDC defendants' solicitations of IDC employees after having left IDC's employ, as well as their practice of "stealing IDC's

[6]As a general policy matter, one firm's hiring of its competitor's employees does not present a "compelling case for antitrust intervention." 3 P. Areeda & D. Turner, *Antitrust Law,* § 702b at 109 (1978) (referring to monopolist's hiring of competitor's employees). A contrary analysis might constrict the freedom of employees to reap the full benefits of their abilities by discouraging them from moving to the employer offering the highest compensation, as well as by discouraging employers from bidding on a competitor's employees. *Id.*

[7]Our conclusion might be altered had the IDC defendants misappropriated trade secrets from IDC in the course of working for NRT. The jury, however, found that IDC possessed no such trade secrets.

customers" also after leaving IDC, reflect nothing more than effective performance of their duties as NRT employees. *See Adjusters Replace-A-Car, Inc.* v. *Agency Rent-A-Car, Inc.*, 735 F.2d 884, 894 (5th Cir. 1984) (not anticompetitive to hire away competitor's employees who use "own skills and contacts . . . to generate business for [their] new employer, even at the expense of [their] old employer"). Ultimately, the salient point remains that plaintiff did not offer a scintilla of evidence that any of the IDC defendants knew of or participated in the predatory pricing scheme.

Plaintiff, therefore, failed to produce proof which is not "as consistent with permissible competition as with illegal conspiracy." *Matsushita*, 54 U.S.L.W. at 4322. We reverse the district court's denial of defendants' motion for judgment notwithstanding the verdict with respect to the section 1 claim.

2. *Section 2 Claim*

Section 2 expressly prohibits individuals from "combin[ing] or conspir[ing] with any other person or persons, to monopolize . . . ." 15 U.S.C. § 2. The elements of a conspiracy to monopolize are "(1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy."[8]

(*Text continued on page 7125*)

[8]The trial judge instructed the jury that "the elements of [conspiracy to monopolize] are essentially the same for [the elements of] an attempt to monopolize . . . with the additional proof of a conspiracy to achieve that purpose . . . ." J. App. at 2221-22. Unlike the elements required to establish an attempt to monopolize, however, proof of a conspiracy to monopolize does not require a dangerous probability of success. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 789 (1946); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961); *Reborn*

Enterprises, Inc. v. *Fine Child, Inc.*, 590 F.Supp. 1423, 1451 (S.D.N.Y. 1984), *aff'd per curiam*, 754 F.2d 1072 (2d Cir. 1985). *See also Terry's Floor Fashions* v. *Burlington Industries*, 568 F.Supp. 205, 215 (E.D.N.C. 1983), *aff'd*, 763 F.2d 604, 606 n.1, 615 (4th Cir. 1985), *Bonjorno* v. *Kaiser Aluminum & Chemical Co.*, 752 F.2d 802, 811 n.3 (3d Cir. 1984), *cert. denied*, 54 U.S.L.W. 3841 (U.S. June 24, 1986); Von Kalinowski, 3 Antitrust Laws and Trade Regulation § 9.02[1] at 9-35 (1986).

Courts have confused the elements of conspiracy to monopolize with those of attempt to monopolize. *See, e.g., Levitch* v. *Columbia Broadcasting System, Inc.*, 495 F.Supp. 649, 668 (S.D.N.Y. 1980) (conspiracy to monopolize, like attempt to monopolize, requires dangerous probability of success), *aff'd*, 697 F.2d 495, 496 (2d Cir. 1983); *Kreager* v. *General Electric Co.*, 497 F.2d 468, 471 (2d Cir.) (same), *cert. denied*, 419 U.S. 861 (1974). *See also V. & L. Cicione, Inc.* v. *C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651-53 & n.11 (E.D. Pa. 1975) (treating all violations of Sherman Act § 2, including conspiracy to monopolize, as requiring a showing of dangerous probability of success), *aff'd mem.*, 565 F.2d 154 (3d Cir. 1977). Indeed, the Supreme Court has recognized that the elements of an attempt to monopolize are subject to confusion with those of a conspiracy to monopolize. *Continental Ore Co.* v. *Union Carbide*, 370 U.S. 690, 709 (1962). *See* Von Kalinowski, *supra*, § 9.02[1] at 9-33 & n.4 (listing cases which confuse elements of attempt to monopolize and conspiracy to monopolize by requiring dangerous probability of success in both).

Congress outlawed the conspiracy itself. *Nash* v. *United States*, 229 U.S. 373, 378 (1913). Once a plaintiff establishes a conspiracy with a specific intent to monopolize, proof of success or impending success is irrelevant. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 789 (1946) ("[i]t has long been settled . . . [that defendants] might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy"); *United States* v. *Griffith*, 334 U.S. 100, 107 n.9 (1948) (same). *See Copperweld*, 467 U.S. at 767-71 & n.13 (explaining Congress' intent and rationale for treating conspiratorial conduct more harshly than unilateral conduct).

A major concern underlying antitrust jurisprudence lies in the fear of mistakenly attaching antitrust liability to conduct that in reality is the competitive activity the Sherman Act seeks to protect. *See* Part A, *supra*; Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1352-53 (1982). In this context, we note that proof problems regarding antitrust conspiracies are remedied by the close judicial scrutiny applied to evi-

Paralegal Institute, Inc. v. *American Bar Ass'n,* 475 F.Supp. 1123, 1132 (E.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 575 (2d Cir. 1980). *See Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76, 85 (2d Cir. 1981) (citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)) ("The essence of [a conspiracy to monopolize] is an agreement entered into with the specific intent of achieving monopoly . . . ."), *cert. denied,* 455 U.S. 943 (1982).

Defendants argue that the evidence was insufficient as a matter of law to permit an inference of a conspiracy to monopolize. The corpus of evidence from which the jury might have drawn such an inference is presented in Part B(1), *supra.* We conclude that any implication drawn from such evidence that the IDC defendants harbored the proscribed intent to monopolize must rest on the same impermissible speculation that flawed the jury's finding of a conspiracy to restrain trade. Plaintiff's theory fails because it does not reasonably establish that any individual defendant except Walsh intended to create a monopoly; a plurality of actors sharing such an intent is required under section 2. *See Northeastern,* 651 F.2d at 85. We,

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dence of their existence. *Cf. Matsushita,* 54 U.S.L.W. at 4322-23 (antitrust law limits the range of permissible inferences of conspiracy from ambiguous evidence); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 763-64 (1984) (same). Attempted monopoly, however, implicates proof problems which partly explain our requirement that plaintiffs establish a dangerous probability of success under this section 2 offense. *See* Part A, *supra*; Handler, *supra,* at 1352-53 (dangerous probability element in attempted monopoly cases "assur[es] that aggressive single-firm conduct will not be attacked as attempted monopolization," *id.* at 1353; assures that procompetitve conduct will not be chilled by antitrust laws). Conspiracy to monopolize, therefore, differs from attempt to monopolize in at least one respect critical to our imposition of the additional element of a dangerous probability of success.

therefore, reverse the district court's denial of defendants' motion for judgment notwithstanding the jury's verdict with respect to the section 2 claim.

The judgment of the district court is reversed and the case is remanded to the district court for entry of judgment in favor of defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

June 19, 1985

No. 82 Civ. 8709 (JFK)

INTERNATIONAL DISTRIBUTION CENTERS, INC.,
Plaintiff,

—v.—

WALSH TRUCKING CO., INC., Coastal Freight Lines, Inc., Hempstead Delivery Co., Inc., National Retail Transportation, Inc., Francis J. Walsh, Jr., Kenneth B. Henning, Mark S. Tice, Raymond Weiss, Carmine Sabatini, and Chuck Hannon,
Defendants.

OPINION AND ORDER

KEENAN, *District Judge*:

STATEMENT

Plaintiff has prevailed after a trial of more than six weeks on three Sherman Act ("Act") antitrust claims. The Court heard 30 days of testimony from 30 witnesses and received hundreds of exhibits in evidence. The jury has awarded to plaintiff antitrust damages in the amount of $13,208,697.00 which are to be trebled under the Clayton Act for a total award of $39,626,091.

Plaintiff International Distribution Centers, Inc. ("IDC") is a trucking company which transports Garments on Hanger (GOH) in Less Than Truckload (LTL) quantities along the traffic lane running between Pennsylvania and New York City.

Plaintiff alleged that (1) Frank Walsh and the corporate defendants attempted to monopolize the LTL transportation of GOH among garment manufacturers, suppliers, contractors and retailers along the so-called Pennsylvania "corridor," or traffic lane, i.e., the New York, New Jersey, Pennsylvania route, thereby causing antitrust injury to IDC; (2) defendants conspired with one or more other persons to unreasonably restrain trade in connection with LTL transportation of GOH among garment manufacturers, suppliers, contractors and retailers along the so-called Pennsylvania "corridor," thereby proximately causing antitrust injury to IDC; and (3) defendants conspired with one or more other persons to monopolize the LTL transportation of GOH among garment manufacturers, suppliers, contractors and retailers along the so-called Pennsylvania "corridor," thereby proximately causing antitrust injury to IDC. On these three counts, the jury found for plaintiff after three days of deliberations.

Plaintiff also urged that one or more of the defendants induced key IDC employees to leave IDC's employ in order to obtain plaintiff's trade secrets for defendants' use, thereby causing injury to IDC. Finally, plaintiff alleged that the defendants solicited plaintiff's customers by utilizing IDC trade secrets, thereby causing injury to IDC. The jury found that plaintiff had failed to meet its burden with regard to its possession of trade secrets and dismissed the plaintiff's two trade secrets contentions.

Having found for the plaintiff on the three antitrust claims, the jury did not consider defendants' counterclaim for unfair competition.

The jury was charged on the elements of attempted monopolization under Section 2 of the Sherman Act, the elements of conspiracy to monopolize under Section 2 of the Act and the elements of conspiracy to unreasonably restrain trade under Section 1 of the Act. Further, the jury was charged at length on antitrust damages and was specifically told that "the plaintiff is not entitled to speculative damages and you should not engage in guesswork." (Transcript ("Tr.") 4704).

Prior to summations, defense counsel requested that the members of the jury be specifically told that they could make notes of exhibit numbers as the exhibits were referred to by counsel during summations so that the jury could request the exhibits during its deliberations. The Court granted this application and the jury made notations and did request many of the exhibits referred to and relied on by counsel in their closing arguments.

It is in this context that defendants move for judgment n.o.v., or for a new trial, pursuant to Rule 50 of the Federal Rules of Civil Procedure. The Court has carefully reviewed the trial transcript of over 4,700 pages and studied the excellent submissions by counsel on both sides.

DISCUSSION

Legal Standards for Judgment N.O.V. and New Trial

Defendants have moved for judgment n.o.v. or a new trial under Rule 50 of the F.R.Civ.P.. These motions are denied for the reasons set forth below. However, remittitur is ordered and the amount of the award is reduced for the reasons set forth on p. 102 et seq. *infra*.

In *Tennant v. Peoria & Pekin Union R.R. Co.* 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944), the Supreme Court set forth the function of the trial court in reviewing a jury verdict:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Accord Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959). Judgment n.o.v. is to be granted only when:

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or

> (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.

Mattivi v. South African Marine Corp., 618 F.2d 163, 167-68 (2d Cir.1980).

It is in this framework that the Court approaches this motion.

A. *Attempted Monopolization under Section 2 of the Sherman Act*

Defendants maintain that plaintiff failed to establish that defendants violated Section 2 of the Sherman Act by attempting to monopolize the relevant market.

1. *Dangerous Probability of Success*

The defense urges in this motion that there was no "dangerous probability of success" and that therefore plaintiff's claim must fail since such must be shown to establish an attempt to monopolize under Section 2 of the Sherman Act. *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir.1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977). In this regard the Court charged the jury as follows:

> A dangerous probability means more than a mere possibility. It means a reasonable likelihood that by resorting to unlawful acts Walsh and/or NRT have come dangerously close to achieving a monopoly position. [Tr. 4689]

Plaintiff argues with some force that there was overwhelming evidence that the defendant Frank Walsh had a specific intent to monopolize. There was an abundance of proof to that effect before the jury. In his treatise, Professor Sullivan writes at p. 138 in "The Law of Anti-Trust," Section 51 (1977):

> Neither is there reason to hesitate to condemn conduct short of close probability of success on the ground that such a rule would unduly discourage effective, though

> aggressive, competitive conduct. By requiring (under the intent test) that the conduct be of a kind plainly threatening competitive conditions, the rule already filters out any serious risk that desirable conduct will be inhibited. Conduct which constitutes an attempt is predatory, coercive, or calculated to heighten entry barriers; there is nothing which should make us hesitate to condemn it if the evidence leaves no doubt that the conduct has been properly characterized.

The Second Circuit in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 85 (2d Cir.1981) (citation omitted), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982), pointed out that "[b]ecause section 2's prohibition of attempts to monopolize encompasses conduct by firms lacking monopoly power . . . its potential reach is broader than the proscription against monopolization."

At trial plaintiff produced witnesses in the garment industry who testified to the limited number of trucking companies which transported GOH in LTL quantities in the Pennsylvania traffic lane. Given this limited number of competitors and the significant amount of business which IDC established it lost to the Walsh interests, the jury could reasonably have inferred that defendants possessed, in the words of the Court's charge (Tr. 4690), "sufficient market power to render their conduct likely to succeed." The Walsh companies possessed real economic clout compared to competitors in the market. (Tr. 1336, DTX 717). Three months after entering the market, defendants had procured seven of plaintiff's customers with annual sales of over $1 million. In addition, Walsh interests had recently purchased three companies doing business in the relevant market and had conferred with principals of other competitors regarding possible acquisition by the Walsh interests. Testimony of Walsh's power in the industry was received at several points in the proceeding. (Tr. 804, 1897-1901, 2141-42, 2283-89, 2293).

Further, there was ample evidence, if believed, of barriers to entry into the market (Tr. 474-75, 2937 and 2929) and of the

existence of both a relevant product market (Tr. 1468, 1515-16, 2813, 2825-26, 4341, DTX 233) and geographic market. (Tr. 476-77, 1466-68, 2120, 4338). It should be noted that the defense was the source of some of the evidence just cited.

Based on the proof presented at trial, this Court cannot conclude that "there is . . . a complete absence of evidence [supporting the verdict] . . . . or . . . an overwhelming amount of evidence in favor of the movant," *South African Marine Corp.*, 618 F.2d at 167-68, on the issue of dangerous probability of success.

2. *Predatory Pricing*

In support of its motion, the defense seems to concede that the Court properly instructed the jury on this issue of anticompetitive conduct (Defendant's Brief at 35, 37), but argues that plaintiff failed to meet its burden in this regard and that the verdict was "in blatant disregard of the Court's instructions." (Defendants' Brief at 38). Plaintiff, of course, argues that "the evidence shows predatory pricing in the traditional sense . . ." (Plaintiff's Brief at 55). Both sides cite *Northeastern Telephone, infra* p. 102, to buttress their arguments.

The plaintiff called as its experts Dr. Irwin Silberman and Ernest L. Sommer, each of whom testified at great length. (Tr. 2692-2751, 2757-2803, 2806-63, 2882-2937, 4333-70, 4429-65, 4469-75). The *Areeda-Turner* rule on predatory pricing was explored in front of the jury. In fact, Professor Areeda's deposition testimony relative to anticipated costs and predation was read into the record (Tr. 3936). A fair reading of the Silberman testimony (Tr. 2911-20, 4355-56) demonstrates again that the jury was not unreasonable in concluding that plaintiff's experts applied correct standards as to fixed and variable costs. Moreover, plaintiff offered evidence which, if believed, could lead the trier of the facts to conclude that defendants' pricing was neither temporary nor designed to acquire new business lawfully. (Tr. 2832-33, 2911-19).

The jury was justified in finding that Frank Walsh and the corporate defendants attempted to monopolize the LTL trans-

portation of GOH in the Pennsylvania Corridor in violation of Section 2 of the Sherman Act.

B. *Conspiracy to Monopolize in Violation of Section 2 of the Sherman Act*

At page 64 of its memorandum on this motion the defense states that "the Court correctly instructed the jury" on the conspiracy to monopolize issue but that there was not proof that a conspiracy existed. The Court finds that there was sufficient proof from which the jury could have inferred the existence of conspiracy prior to the time when individual defendants left IDC and joined the Walsh group. (Tr. 1160-62, 3155-56, 3161-62, 3374-75).

Since a finding for the plaintiff on the conspiracy to monopolize issue requires proof of the elements of an attempt to monopolize, plus proof of a conspiracy, the Court concludes, based on its reasoning at pages 100-01 *supra*, and the fact that there is evidence of a conspiracy, that the jury had a rational basis to conclude that the defendants violated Section 2 by conspiring to monopolize.

C. *Conspiracy to Unreasonably Restrain Trade Under Section 1 of the Sherman Act*

On this issue, defendants argue that plaintiff failed to prove the existence of a conspiracy and failed to prove an unreasonable restraint on competition in a relevant market. As pointed out above, the jury had a rational basis for finding the existence of a conspiracy.

As to the issue of whether there existed unreasonable restraint on competition in a relevant market, the Court finds that there was a sufficient basis for the jury to conclude that a relevant market existed, p. 101 *supra*. The Court cannot conclude that the jury was in error in finding that such a conspiracy was an unreasonable restraint of trade. The jury had sufficient evidence before it to decide that defendants' conduct was anti-competitive and that their purpose was to destroy competition. (Tr. 252, 253, 2919, PX 93).

Damages

It is well established law that a treble damage award may not be predicated upon speculation or guesswork. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931). What is required to sustain a damage award in a case such as this is that there be a reasonable basis for estimating damages "based on relevant data." *Bigelow v. RKO Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946). The jury was specifically charged that "the plaintiff is not to be awarded speculative damages," "the plaintiff is not entitled to speculative damages and you should not engage in guesswork." (Tr. 4704).

The plaintiff offered evidence that it lost $7,278,202 in the year March 1, 1983 to February 29, 1984, thereby causing injury to the plaintiff in the amount of $1,848,663.

IDC has used a "before and after" damage theory in support of its claim. Plaintiff took March 1, 1982 through February 28, 1983 as its "before" period and March 1, 1983 through February 29, 1984 as its "after" period. Under the facts of this case, the choice of these periods was not unreasonable. IDC began to feel the impact of losing customers in early 1983 and Dr. Silberman's damage report was due in April 1984 so plaintiff could be ready for trial.

As its "before" figure plaintiff claims to have proven revenues in the Pennsylvania "corridor" of $22,705,313 and while defendants have not directly challenged the accuracy of this figure, the Court concludes that the figure is in error because it includes revenues directly attributable to the Germantown, New York, IDC Terminal. (Tr. 2858). The undisputed evidence is that the Germantown Terminal served the Southern tier of New York State and the New England states of Vermont, Massachusetts and Connecticut, not the Pennsylvania "corridor." (Tr. 2051).* The Silberman damage report (PX 224)

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* It should be noted that in its moving papers, the defense attacks the amount of the verdict as unreasonable and not supported by the evidence. Nowhere in the papers does the defense specifically urge that the Germantown, New York revenues be excluded from the damage award although

indicates that IDC received $908,805 in revenue from March 1, 1982 through February 28, 1983 at Germantown. Thus, the "before" revenue figure should be reduced to $21,796,508.

IDC maintains that it established Pennsylvania "corridor" revenues of $15,427,111 in the "after" period of March 1, 1983 through February 29, 1984. Again, plaintiff included revenue from the Germantown, New York Terminal in its calculation. The damage exhibit (PX 224) shows $658,253 in revenue at Germantown during this "after" period. This requires reducing the "after" revenue amount to $14,768,858. Subtracting the corrected "after" amount from the corrected "before" amount establishes a difference in revenues of $7,027,650, not $7,278,072, the figure claimed by plaintiff.

To arrive at a lost profit figure plaintiff's expert, Dr. Silberman, concluded that IDC was able to avoid 74.6 cents in costs for each dollar of revenue it lost. He also concluded that IDC lost 25.4 cents per dollar as a contribution to overhead by virtue of its lost revenues. The Court does not fault these calculations in any way. Dr. Silberman called the .254 a lost "contribution" (Tr. 2842) and multiplied the difference in revenue figure by .254 to arrive at the figure of $1,848,663 (p. 102 *supra*) as the amount of injury caused to plaintiff. Since the Germantown, New York revenues were improperly included, the amount should be $1,785,023 (7,027,650 x .254).

Plaintiff urged the jury that it should recover lost future profits and offered evidence as to lost profits for a 10 year period. This is not an unreasonable period. *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 567 (2d Cir.1970). This 10 year amount of $18,486,630, however, is in error because it includes

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passing reference to the Germantown revenues was made in defense counsel's summation. (Tr. 4554). In oral argument on this motion (Tr. 42, 43), the Court inquired of counsel for the plaintiff about the propriety of the inclusion of the Germantown revenue figures. This prompted defense counsel in their Reply oral argument to suggest that "there is also a fatal inconsistency in including the Germantown figures in the damages study." (Tr. 54). The Court is excluding the Germantown revenues since they clearly are not derived from the Pennsylvania traffic lane revenues and thus are not properly part of the damage award.

the Germantown, New York revenues. The correct lost profit sum should be $17,850,230. The defense urges that plaintiff is not entitled to any lost profits claiming that plaintiff failed to establish that the injury was permanent. There is evidence to the contrary (Tr. 434, 435) from which the jury could have concluded that the injury was permanent.

The defense argues that the projection of damages should be reduced to present value by utilization of a 20% interest rate. Plaintiff, through Dr. Silberman, urged the application of a 10% interest rate to arrive at the present value figure. There is nothing unreasonable in the jury having accepted the 10% rate. Use of the 10% rate requires a multiplier of .6145 according to "Principles of Corporate Finance." (PX 253). The multiplier was explained in the Silberman testimony. (Tr. 2846-2850).

The calculations with the Germantown, New York figures included are as follows:

$18,486,630	(10 year lost future profits)
× .6145	(Reduce to present value at 10% interest rate)
11,360,034	
+1,848,663	(Lost profits for "after" period)
13,208,697	(Total lost profits)
× 3	(Clayton Act trebling)
$39,626,091	(Total Damage Award)

The proper calculations with the Germantown Terminal amounts excluded are as follows:

$17,850,230	(10 year lost future profits)
× .6145	(Reduce to present value at 10% interest rate)
10,968,966	
+1,785,023	(Lost profits for "after" period)
12,753,989	(Total lost profits)
× 3	(Clayton Act trebling)
$38,261,967	(Total Damage Award)

Although defendants specifically have indictated they are not interested in a remittitur (p. 74 Reply Memorandum) and the Court recognizes that "Remittitur is a limited exception to the sanctity of jury fact-finding." *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898, 902 (2d Cir.1982), *cert. denied*, 464 U.S. 1039, 104 S.Ct. 700, 79 L.Ed.2d 165 (1984), the Court feels that the interests of justice require such a result in this case in view of the improper inclusion of the Germantown, New York Terminal revenues in the damage award. This is not a case like *Perfect Fit Industries v. Acme Quilting Co.*, 494 F.Supp. 505 (S.D.N.Y.1980), (modified on other grounds), 646 F.2d 800 (2d Cir.1981), a libel case cited by defendants. Here, "the Court can identify . . . . a quantifiable amount that can be stricken." *Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir.1984). Remittitur is the proper result in this case.

CONCLUSION

The motions for judgment n.o.v. or for a new trial are denied. Remittitur is ordered. The jury award is reduced to $12,753,989 which trebled under the Clayton Act becomes $38,261,967.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 8709 (JFK)

INTERNATIONAL DISTRIBUTION CENTERS, INC.,

Plaintiff,

—against—

WALSH TRUCKING CO., INC., COASTAL FREIGHT LINES, INC., HEMPSTEAD DELIVERY CO., INC., NATIONAL RETAIL TRANSPORTATION, INC., FRANCIS J. WALSH, JR., KENNETH B. HENNING, MARK S. TICE, RAYMOND WEISS, CARMINE SABATINI, and CHUCK HANNON,

Defendants.

SECOND AMENDED JUDGMENT

This action came on for trial before a Court and a jury, Honorable John F. Keenan, U.S.D.J., presiding, and the Court having instructed the jury to find a general verdict and also to make answer to certain interrogatories, the jury having duly rendered a verdict and having made answer to said interrogatories on August 1, 1984, Judge Keenan having denied defendants' Motion for Judgment Notwithstanding the Verdict or a New Trial and ordered a remittitur on June 19, 1985, and Judge Keenan having ordered a permanent injunction and determined a reasonable attorney's fee on January 8, 1986,

IT IS ORDERED, ADJUDGED AND DECREED: (1) that defendants National Retail Transportation, Inc., Walsh Trucking Co., Inc., Coastal Freight Lines, Inc., Hempstead Delivery Co., Inc., and Francis J. Walsh, Jr., attempted to monopolize the less than truckload transportation of garments on hangers among garment manufacturers, suppliers, contractors and retailers along the New York, New Jersey, Pennsylvania route, proximately causing antitrust injury to plaintiff International Distribution Centers, Inc.; (2) that defendants Francis J. Walsh, Jr., Kenneth B. Henning, Mark S. Tice, Raymond Weiss, Carmine Sabatini and Chuck Hannon conspired to monopolize the less than truckload transportation of garments on hangers among garment manufacturers, suppliers, contractors and retailers along the New York, New Jersey, Pennsylvania route, proximately causing antitrust injury to plaintiff International Distribution Centers, Inc.; (3) that Francis J. Walsh, Jr., Kenneth B. Henning, Mark S. Tice, Raymond Weiss, Carmine Sabatini and Chuck Hannon conspired to unreasonably restrain trade in connection with the transportation of garments on hangers among garment manufacturers, suppliers, contractors and retailers along the New York, New Jersey, Pennsylvania route, proximately causing antitrust injury to plaintiff International Distribution Centers, Inc.; (4) that the plaintiff International Distribution Centers, Inc. suffered antitrust damages by reason of the unlawful acts of the defendants in the amount of $12,753,989; and (5) that plaintiff is to recover of the said defendants threefold this sum pursuant to Section 4 of the Clayton Act, 15 U.S.C. Section 15(a), or the total amount of $38,261,967, with interest thereon at the legal rate from August 1, 1984; and it is further

ORDERED, ADJUDGED AND DECREED, that the preliminary injunction heretofore issued is dissolved; and that plaintiff's motion for a permanent injunction is granted as follows:

A. The defendants and each of them are permanently enjoined from:

(1) directly or indirectly soliciting or inviting the hiring of, or hiring, any employees of the plaintiff;

(2) directly or indirectly making false or misleading representations about plaintiff or its business;

(3) formulating and/or pursuing any plan to destroy plaintiff as a competitor in interstate commerce; and

(4) conspiring with one another to do any of the foregoing acts.

B. The defendants and each of them are enjoined for a period of three years from the date hereof from:

(1) providing trucking services in interstate commerce between and among points in the states of New York, New Jersey, and Pennsylvania without having first filed an applicable tariff with the Interstate Commerce Commission; and

(2) providing trucking services in intrastate commerce within the State of Pennsylvania, without having first filed an applicable tariff with the Pennsylvania Utility Commission;

(3) offering to sell, or selling, trucking services between or among any points in the States of New York, New Jersey, and Pennsylvania for the transportation of garments on hangers at prices below those contained in such filed tariffs. "Garments on hangers" for the purposes of this sub-paragraph shall include garments on hangers as well as raw materials used in the manufacture of garments to be shipped by trucks on hangers;

(4) offering to sell or selling any transportation services at an unreasonably low price or at a price that is below cost for the purpose of attempting to monopolize or monopolizing the transportation of garments on hangers between and among points in New York, New Jersey, and Pennsylvania, or for the purpose or with the natural and

probable effect of destroying competition or eliminating a competitor engaged in the transportation of garments on hangers.

C. The defendants shall comply with each of the following conditions:

(1) Defendants shall submit to plaintiff and file with the Clerk of the Court an affidavit in substantially the form attached as Exhibit A from both Frank J. Walsh, Jr. and also from the chief financial officer of each defendant corporation, for each corporate defendant's five largest customers, during each calendar quarter for the preceding calendar quarter, as follows:

Annual Quarter	*Filing Date*
1	April 20
2	July 20
3	October 20
4	January 20

Defendants shall file such affidavit for twelve consecutive calendar quarters beginning with the first filing date after the date of entry hereof, which will be January 20, 1986.

(2) In addition, defendant shall cause its public accounting firm to prepare an audited and certified quarterly profit and loss statement with information categories in substantially the form annexed as Exhibit B for defendants' less-than-truckload operations between and among points in New York, New Jersey, and Pennsylvania. This statement shall be sent to plaintiff and filed with the Clerk of the Court at the same intervals as the affidavits required in the preceeding subparagraph.

(3) The provisions of this judgment shall apply to the defendants and to each of their respective subsidiaries, successors, assigns, officers, directors, employees and agents and to all other persons in active concert or participation with any of them who receive actual notice of this order.

(4) Each corporate defendant, at least 60 days prior to the transfer, sale or disposition of all, or substantially all, of the assets used by it shall provide notice in writing to the plaintiff concerning the planned transfer, sale or disposition. The notice shall identify the person(s) acquiring such assets, the terms and the expected consummation date of the transaction.

D. Each corporate defendant is ordered and directed:

(1) To mail or otherwise furnish within sixty (60) days after the entry of this order a copy thereof to each of (i) its officers and directors, (ii) its agents and employees with supervisory or management responsibility, or with responsibility over rates or rate matters, including billing and collections, and (iii) the officers and directors of its parent and subsidiary corporations and within seventy (70) days from the aforesaid date of entry to file with the Clerk of the Court and the plaintiff an affidavit setting forth the fact and manner of compliance with this section separately stating the names of each person so notified;

(2) To establish a reasonable program for dissemination of, education as to, and compliance with this judgment, involving each corporate officer, director, employee and agent having responsibilities in connection with or authority over the establishment of rates or rate matters, including billing and collections, advising them of their obligations under this judgment.

(3) To furnish to plaintiff on or about the anniversary date of this order for a period of three (3) consecutive years from the date of its entry, an account of all steps said defendant has taken during the preceding year to discharge its obligations under this section and to include with said account copies of all written directives issued during the prior year with respect to compliance with the terms of this judgment.

E. The requirements imposed on defendants pursuant to Sections C (1), (2), (3) and (4); and D (2) and (3) shall

terminate upon the filing with the Clerk of this Court a full satisfaction of judgment.

F. The Court shall retain jurisdiction of this matter in order to enforce the terms of this order. This order shall be stayed as against bankrupt defendants during the pendency of bankruptcy proceedings; and it is further

ORDERED, ADJUDGED AND DECREED that the original judgment entered August 13, 1984, the Amended Judgment entered June 20, 1985 and the Revised Amended Judgment entered October 9, 1985 be vacated; and it is further

ORDERED, ADJUDGED AND DECREED that causes of action numbered "First" and "Second" of the Verified Complaint, dated December 19, 1982, be and hereby are dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the counterclaims dated February 17, 1983 be and hereby are dismissed in their entirety; and it is further

ORDERED, ADJUDGED AND DECREED that pursuant to Section 4 of the Clayton Act, plaintiff International Distribution Centers, Inc. is entitled to the costs of this action and a reasonable attorney's fee in the amount of $1,063,240.17 with interest thereon from August 13, 1984.

Dated: New York, New York
February 4, 1986

/s/ JOHN F. KEENAN
U.S.D.J.

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 8709 (JFK)

INTERNATIONAL DISTRIBUTION CENTERS, INC.,

Plaintiff,

—against—

WALSH TRUCKING CO., INC., COASTAL FREIGHT LINES, INC., HEMPSTEAD DELIVERY CO., INC., NATIONAL RETAIL TRANSPORTATION, INC., FRANCIS J. WALSH, JR., KENNETH B. HENNING, MARK S. TICE, RAYMOND WEISS, CARMINE SABATINI, and CHUCK HANNON,

Defendant.

AFFIDAVIT OF COMPLIANCE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

FRANK J.WALSH, JR., being first duly sworn according to law, deposes and says as follows:

1. I am the (officer) of (name of corporate defendant) (the "Corporation") and am fully familiar with the facts stated.

2. During the calendar quarter beginning ____, 198_ and ending ____, 198_, the five (5) largest customers of the Corporation by gross dollar volume of trucking transportation

of garments on hangers and raw materials used to manufacture such garments on hangers were as follows:

name of customer	*address of customer*
" " "	" " "
" " "	" " "
" " "	" " "
" " "	" " "
" " "	" " "

3. I have personally reviewed all bills rendered by the Corporation to each of the above-mentioned five customers for such trucking services and have reviewed all payments from each of these five customers which correspond to those services.

4. In each case, I have reviewed any applicable ICC and/or PUC tariff and can state unequivocally that none of these customers received trucking services from or on behalf of the Corporation for a price below that stated in each applicable tariff.

5. The applicable tariffs are as folows: (identify by authority, number, page, and date).

FRANCIS J. WALSH, JR.

Subscribed and sworn to before me
this ____ day of _____, 198_.

Notary Public

EXHIBIT B

Results of Operations

as at _____

Final

Revenue

Operating Expenses:

- General & Adminis. Wages
- Operating Wages
- Fringe Benefits
- Fuel
- Operating Supplies & Expenses
- General Supplies & Expenses
- Operating Taxes & License
- Insurance
- Communications & Utilities
- Depreciation Expense
- Equipment Rental
- Building Rental
- Professional Fees

Total Operating Expenses

Operating Income (Loss)

Interest Expense

Guarantee Fees

Income (Loss) before Taxes

Provision for Taxes

Net Income (Loss)

Retained Earnings

APPENDIX D

PLAINTIFF'S EXHIBIT 93

MEMORANDUM

To: LEN IVANS
RIC HOFFMAN, ESQ.
LARRY TORNEK
JERRY LIGHT

Fr: JERRY ESKOW

Date: NOVEMBER 10, 1982

ESKOW-WALSH NOVEMBER 3 MEETING

By Wednesday, November 3rd, 1982, Frank Walsh had already hired 3 of our managers (Chuck Hannon, Ray Weiss and Carmine Sabatini). I called and made an appointment to see Frank Walsh at 11:00 AM. I went to his office in North Bergen and spent 3 hours with him.

I told him that the purpose of my visit was to determine the "rules of the ball game". To answer his puzzlement, I told him about the relationship that I had developed with Morty Viders. While our rates were not the same (either to handle GOH or the Raw Materials) I assured Silver Line that I did not engage in cut throat competition. IDC would sell better service, greater coverage, finer people, etc., but we would not seduce a Silver Line customer by offering to handle Garments for 8¢ if Silver Line was getting 10¢. I recognized that we wouldn't get the business but instead we would destroy his rate structure and in retaliation he would do the same thing to IDC. While Silver Line does have lower Raw Materials rates than does IDC, we have lost and gained one another customers. To the best of my knowledge it has never been on the basis of cut throat competition.

In response Frank Walsh said that he didn't subscribe to this business philosophy. He was very candid in what was his

business philosophy, and in words or in substance, the following is what Walsh told me at our meeting on November 3, 1982.

1—Walsh believed in either buying or destroying his competition. If he couldn't reach a mutual agreement on the price, he would attack—

a) He would hire key people such as a son or a son-in-law. He said he did it with Gilbert and Nelson and others, and when he accomplished this, the credibility of his enemy was shaken.

b) He would sharply cut the existing rates. Since he was the "have not" he placed his enemy in a "no win" situation. If the enemy met his rates the enemy would be destroyed because the rates were not compensatory. If the enemy did not succumb but instead chose to give up the business to Walsh, the enemy would be destroyed by having the same overhead but with less revenue.

When the enemy was annihilated Walsh would discharge the executives he seduced, would take over the business by default and would raise the rates accordingly.

2—Using this technique Walsh said that he had grown from two trucks to an $80,000,000 business employing 3,000 people in less than 10 years.

3—Walsh said that he lavishly entertained, and he was able to seduce any executives he wanted by giving them offers they could not resist. Since it was only a short-term arrangement he said he could pay them double or triple their worth.

4—Walsh said he was driven by a "hatred" passion and he proceeded to name names—Terry Cohen, Harvey Brody, Master Truckmen, Bill Nelson, and others. He quoted chapter and verse of where and when they had crossed him and how he had gotten revenge or would get revenge in the future. He made a big point about his intense hatred for

the socalled "tough guys" and how he had spit in their eyes and done things that had never been done before.

5—He said that people like Burt Goldman (Merit), Bernie Ehrlich (Ehrlich Newmark), Jim McClain (Tri State), and others were assholes and that he didn't even feel a sense of conquest when he destroyed them.

6—He said that he had bought Merit, Bradleys, Nelson, Tri-State, Spear, Evans, and at least 8 or 10 local garment center truckmen including Ideal.

7—He said that with the exception of Tom Gambino, and that he might possibly give Harvey Brody a pass, it was his intention to take over every garment center truckman.

8—He said that he was determined to completely obliterate IDC. When I asked him in what way had I injured him to be given such a prominent position on his hit list, Walsh said—

a) I had loused up his plan to take over IDC when I arrived on the scene in February 1981. Sid "shit head" Lieberman was retarded and the company was about to go out of business and he was standing in the wings to pick up the pieces.

b) In December 1981, after I had done the incredible job of turning this deathly sick company into a winner, he had made an offer to Paul, Weiss to buy the company for $3,000,000 in cash. He complimented me on having beaten him out on the purchase, and that was another reason that he had to destroy IDC.

9—He said that so long as the orphans Jill and Jeffrey were involved he didn't have the heart to destroy the company. However, when I bought the company he no longer had any constraints and he couldn't care less about Len Ivans and his children since they were rich and were due to inherit Natalie's fortune. He said that the purchase price insured Jeffrey and Jill of a good income.

10—He said that for the first time in his career he was going to demolish a company for "defensive reasons". He had always purchased or destroyed companies for offensive reasons, but in the case of Jerry Eskow he not only respected my knowledge, brilliance, contacts, vigor and fanaticism to work as hard as he worked. He said that I was a danger to Walsh and his plans. He said Jerry had cleared the ground, removed the sage brush, driven the piles and layed down the concrete for the helicopter pad when I had abandoned the retail transportation business. He didn't have to build a helicopter pad because he was able to use the one that I built.

11—He said that he was particularly thrilled with the prospect of destroying Jerry Eskow because he was a "champ". I would make his best trophy and he couldn't wait to mount my head on his wall. So far he had gotten very little satisfaction out of destroying the schmucks who had tried to do battle with him in the past.

12—He pointed out to me that Walsh was basically a "truck load" carrier and that IDC was basically an "LTL" carrier. It would be much easier to convert IDC into a truck load carrier than it would be to convert Walsh into an LTL carrier. He said that he wouldn't have been distressed with IDC if we had "stayed in our lanes", if we had minded our own business in Pennsylvania, New York, New Jersey and Florida, he would have probably ignored us—but when we invaded his lanes he got mad. (In response to my question Walsh told me that his lanes were the other 46 states and the balance of the world.)

13—When I told Walsh that I had been serving the New England Corridor, handling thousands of trailer loads of Department Store Merchandise before he, Walsh, was born and that it had been my intention to recapture from the Schusters, St. Johnsbury, Beacon, Plymouth Rock, Spear, Branch, etc. . . . the freight that was once Yale's which had been lost to them, he told me that there was no

way that I could put walls around the (Walsh-Bradleys-Merit-Tri-State lanes), and in no event was he going to take a chance on exposing his freight to Jerry Eskow.

14—For example, he said that he had *no partner*. He said that he had made his brother Norby a rich man, but Norby was not a partner, he had made his sister Cathy a rich woman, but Cathy was not a partner. He had no partners of any kind. In earlier years he had always introduced Carmine Zecardi as his partner.

15—Walsh boasted about the fact that he had very high rates. For example, he said that he was paid $2.10 a mile while most carriers were willing to operate for a $1.10. He said that he wouldn't permit anyone to cut his rates nor compromise his bills. He said that he discontinued credit with anybody who went over 45 days and that his Accounts Receivables averaged only 19 days. He said that if a customer held up paying his bills he would "lose" the customers'-garments until the bill was paid, at which time he would find the "lost" garments.

16—He said that he was sorry that it had to be this way because he admired and respected me and he wished that he would have been successful in his $3,000,000 offer as he would have liked me to be part of his organization running his LTL operations. When I told Walsh that I never knew that he had been a suitor he told me that he had made his $3,000,000 offer in December 1981. I questioned whether he was part of the "Penn Group" and he said . . . . No that's Sidney's Group . . . . I had my own offer.

17—The meeting ended with a handshake and I thought we had some kind of a rapport. However within 72 hours Walsh had stolen 3 more managers and had made overtures to other IDC people (See attached "Walsh Raiding" memo dated November 11th).

/s/ JERRY
Jerry Eskow

GWE:jrl

No. 86-1698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL DISTRIBUTION CENTERS, INC.,

Petitioner,

—against—

WALSH TRUCKING CO., INC., COASTAL FREIGHT LINES, INC., HEMPSTEAD DELIVERY CO., INC., NATIONAL RETAIL TRANSPORTATION, INC., FRANCIS J. WALSH, JR., KENNETH B. HENNING, MARK S. TICE, RAYMOND WEISS, CARMINE SABATINI and CHUCK HANNON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MILTON HANDLER
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May 14, 1987

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the court of appeals, after reviewing the record as a whole in the light most favorable to the plaintiff, err in holding that the evidence was insufficient to permit a reasonable jury to find that the defendants attempted to monopolize, or that they conspired to monopolize or restrain trade, in violation of the Sherman Act?[1]

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1 Pursuant to Supreme Court Rule 28.1, respondent Walsh Trucking Co., Inc. states that it is a wholly owned subsidiary of National Retail Systems, Inc., and that it is the parent corporation of Walsh Trucking & Consolidating Co., Inc., Walsh Marking & Consolidating Services, Inc., and F.N.P. Transport Systems, Inc. Respondent Coastal Freight Lines, Inc. states that it is a wholly owned subsidiary of respondent National Retail Transportation, Inc., and that it has no subsidiaries. Respondent Hempstead Delivery Co., Inc. states that it is a wholly owned subsidiary of Hi-Speed Trucking, Inc., which is a wholly owned subsidiary of National Retail Systems, Inc., and that it has no subsidiaries. Respondent National Retail Transportation, Inc. states that it is a wholly owned subsidiary of National Retail Systems, Inc., and that it is the parent corporation of American Delivery Service, Inc. and respondent Coastal Freight Lines, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1698

INTERNATIONAL DISTRIBUTION CENTERS, INC.,

Petitioner,

—against—

WALSH TRUCKING CO., INC., COASTAL FREIGHT LINES, INC., HEMPSTEAD DELIVERY CO., INC., NATIONAL RETAIL TRANSPORTATION, INC., FRANCIS J. WALSH, JR., KENNETH B. HENNING, MARK S. TICE, RAYMOND WEISS, CARMINE SABATINI and CHUCK HANNON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The petition does not present any issue warranting review by this Court. What petitioner is seeking in essence is a second appellate review of the sufficiency of the evidence to support a jury verdict in an antitrust case that should never have been presented to the jury in the first place. That is true for a variety of reasons, only some of which the court of appeals found it necessary to consider.

The issue in this predatory pricing case is whether the Court of Appeals for the Second Circuit erred in holding that the evidence did not permit a reasonable jury to find an attempt to monopolize, or a conspiracy to monopolize or restrain trade, in violation of the Sherman Act.

More specifically, with respect to the attempt to monopolize claim, the issue is whether the jury could reasonably have found the requisite dangerous probability of successful monopolization of the relevant market where (1) the defendant was a new entrant with zero market share when the alleged predatory pricing began; (2) the plaintiff at that time was the dominant factor in that market with a 50% share; (3) the defendant's entry prices, although below the plaintiff's, were at or above those charged by other competitors; (4) eight other carriers, in addition to the defendant, entered the market for the first time during the period of alleged predation; (5) after the end of its first year of operations in the market, the defendant raised its prices to admittedly nonpredatory levels, and (6) by that time the defendant had achieved no more than a 17% market share, whereas the plaintiff still remained the market leader with 33%.

With respect to the claim that the defendant Walsh and certain former employees of the plaintiff conspired to monopolize and unreasonably restrain trade by predatory pricing, the issue is whether the jury could reasonably have found a conspiracy when there was not a scintilla of evidence that the employees knew of, much less that they participated in, Walsh's alleged predatory pricing scheme.

STATEMENT OF THE CASE

The $38 million treble damage judgment entered against respondents in the district court was predicated upon three jury findings of antitrust liability—each of which had at its core the charge of predatory pricing: (1) that defendant Walsh and four family-owned trucking companies—the principal one being defendant National Retail Transportation, Inc. ("NRT")—had attempted to monopolize the less-than-truckload transportation of garments on hangers ("GOH") along a single traffic lane, the "Pennsylvania corridor," by charging predatory rates when NRT first entered that market in 1983; (2) that Walsh had conspired with the other individual defendants, all former

employees of the plaintiff International Distribution Centers, Inc. ("IDC"), to monopolize the same market—the conspiracy supposedly having been formed in late 1982 *before* those employees left IDC to join NRT and *before* NRT entered the market; and (3) that the identical pre-employment conspiracy had unreasonably restrained competition in the same market.

The court of appeals, after reviewing the record in the light most favorable to the plaintiff, concluded that no reasonable jury could have made these findings on the record before it (App. A at 11a-12a, 17a-18a, 19a, 21a).[2] It therefore reversed the judgment and remanded the case to the district court for entry of judgment in favor of the defendants (*Id.* at 7126).

THE FACTS

The largely undocumented statement of facts in the Petition is replete with erroneous assertions, gross distortions and false innuendoes. Much of its content simply reiterates statements made by petitioner to the court of appeals which respondents were obliged to correct below. We shall not repeat that exercise here, but shall confine ourselves to a brief recital of the salient facts of record which demonstrate that the court of appeals was eminently correct and that this case does not present any issue warranting further review by this Court.[3]

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2 The opinion of the court of appeals is annexed to the Petition as "Appendix A" and page references to that opinion in this brief are preceded by the designation "App. A." Citations to the record, as contained in the Joint Appendix to appellants' and appellee's briefs in the court of appeals, are preceded by the designation "A."

3 Illustrative of the manner in which petitioner has played fast and loose with the record is the reference to IDC's bankruptcy on July 15, 1985 (Petition, p. 8), followed by the assertion that NRT's pricing "resulted in the destruction of IDC and injury to all competitors in the Pennsylvania corridor" (*Id.* at 17). The fact of the matter is that the bankruptcy petition was filed a year and one-half *after* NRT admittedly ceased its alleged predatory pricing, and there is not a scrap of evidence in the record illuminating why the filing occurred—which is hardly surprising since the record in this case covers a period ending

The relevant market in this case is a particular trucking service involving less-than-truckload carriage of garments on hangers along the Pennsylvania corridor (*Id.* at 4a). The plaintiff's principal business was to provide transportation between the New York garment center and contractors' factories in Pennsylvania.[4] To haul GOH, truckers suspend steel bars from the roofs of their trailers so that the garments can be hung from the bars.[5] In addition, ropes are attached to the bars, and more GOH are hung from loops tied in the ropes.[6] The cost of modifying a trailer to install bars is negligible—approximately $3,000.[7]

The plaintiff started business in the 1930s and was the dominant carrier of GOH in the Pennsylvania corridor.[8] Its business was insulated from the rigors of competition by the ICC's pervasive regulation of the trucking industry until deregulation occurred pursuant to the Motor Carrier Act of 1980.[9]

January, 1984. Nor is there any factual basis for IDC's statement that other competitors in the relevant market were injured as a result of NRT's pricing. To the contrary, as the court of appeals noted, these "other trucking firms . . . had been unaffected by NRT's employee raids or alleged predatory pricing" (App. A at 12a).

Another example of petitioner's proclivity to take liberties with the record is the reference to the alleged murder of Mr. Eskow's predecessor at IDC (Petition, p. 5)—an inflammatory hearsay statement which the district court specifically excluded on the ground that it had no relevance to any issue in the case (Trial Transcript, p. 2411).

4 A0890, A0951, A1018-20; PX232 (A0478).

5 A1123-27, A1364-65, A1883.

6 A1123-27, A1870-71, A1883, A1531, A2035-38, A2091.

7 A1127-28.

8 PX 17 at 1-2 (A0305-06); *see also* A0898-99, A2130.

9 Pub. L. No. 96-296, 94 Stat. 793 (codified as amended at 49 U.S.C. §§ 10101-11917 (Supp. IV 1980)). Until the 1980's, the ICC's pervasive regulation of the trucking industry had resulted in "a government-enforced cartel." DTX 223 (Ex Parte No. MC-166, Pricing Practices of Motor Common Carriers of Property Since the Motor Carrier Act of

Prior to that time, "[r]egulatory barriers to entry, rate regulation and the collective determination of rates through rate bureaus" had combined to produce non-competitive rates and to protect inefficient carriers.[10] The most significant entry barrier was the need to obtain operating authority from the ICC, which applied the statutory standard of "public convenience and necessity" so as "to protect incumbent carriers by artificially barring entry."[11] All that changed with deregulation. As the Department of Justice put it, "[t]he central characteristic of this industry, now that Congress and the ICC have substantially eased entry restrictions, is that entry is relatively easy"[12]—either on a *de novo* basis or by geographic expansion on the part of existing carriers.[13] In light of that fact, the Department of Justice, FTC and ICC all concluded that monopolization and predation were "unlikely to be successful in the trucking industry . . . ."[14]

One of many companies to take advantage of deregulation was the defendant NRT, which entered the Pennsylvania corridor in January 1983 at a time when the plaintiff IDC was the dominant factor with a market share of 50%.[15] The balance of

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1980 (Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission, January 17, 1983), at 14 (A0709)) (hereinafter "DTX 223, FTC Comments" (A0696-723)).

10 DTX 223, FTC Comments at 14-15 (A0709-10).

11 DTX 223 (Ex Parte No. MC-166, Pricing Practices Of Motor Common Carriers of Property Since The Motor Carrier Act Of 1980 (Comments of the Department of Justice, January 17, 1983), at 14 (A0641)) (hereinafter "DTX 223, DOJ Comments" (A0626-95)).

12 DTX 223, DOJ Comments, at 12 (A0639).

13 *Id.* at 17-18 (A0644-45).

14 DTX 223, DOJ Comments, at 22 (A0649); DTX 223, FTC Comments, at 26 (A0721); DTX 710, ICC Decision, at 11 (A0762).

15 App. A at 5a; A1128.

the market was then divided among five other competitors.[16] On the heels of deregulation, however, not only NRT but eight other carriers began carrying GOH in the Pennsylvania corridor for the first time.[17] One of these was a *de novo* entrant;[18] the others were carriers operating in other traffic lanes which expanded into the corridor, or which began to carry GOH in addition to their traditional carton freight.

When it became apparent that NRT, having hired certain disaffected IDC employees, was planning to enter the Pennsylvania corridor, the President of IDC, Gerald Eskow, arranged for a meeting with Walsh of NRT (App. A at 5a). According to Eskow, he told Walsh that the purpose of his visit was to determine the "rules of the ball game;" that he did not believe in cut-throat price competition; and that he asked Walsh to travel the "high road" with him by avoiding that type of competition—just as Eskow had done with Silver Line, his largest competitor.[19] There is a dispute about what happened next, but in light of the jury's verdict, the court below accepted Eskow's version that Walsh, after declining the invitation to forego price competition, stated that he would destroy the plaintiff by hiring away employees and charging non-compensatory prices.[20]

When it initially entered the Pennsylvania corridor, NRT priced slightly below IDC's rates[21] but at or above those of other competitors.[22] In January, 1984, after a year of opera-

16 A1128, A0975, A1049, A1062, A1122, A1366-67, A1397, A1476, A1587, A1637-38, A1722, A1880, A1927, A1932, A1947, A2071, A2072, A2135-36, A2138, A2147-48, A2188-89; DTX 45 at 1 (A0511); DTX 163 at 2 (A0557); DTX 282 at 1 (A0732).

17 A0887-88, A0975, A1068, A1109-10, A1122, A1167-68, A1182, A1366-67, A1392-93, A1397, A1476, A1830, A1850, A1927-28; DTX 45 at 1 (A0511); DTX 218 (A0623-24); DTX 235 (A0726); DTX 444 at 1 (A0747).

18 A0887-88, A0975, A1182-83.

19 PX 93 at 1 (A0333); PX 88 (A0331-A0332); A0917, A1077, A1079-82.

20 App. A at 5a; PX 93 at 1-2 (A0333-34); A0900-01.

21 A1101-07, A2146; *see* A1091-93; DTX 659A (A0808).

22 App. A at 12a; A2137-38; *see* DTX 218 at 1 (A0623); DTX 659A (A0808).

tions, NRT raised its rates to levels which IDC conceded were not predatory.[23] By that time, not only had nine new carriers entered the market in the wake of deregulation, but all of the incumbent carriers remained as competitors; IDC's market share had dropped from 50% to 33%,[24] but it still remained the market leader; and NRT had increased its share from zero to either 10% (NRT's estimate) or 17% (IDC's estimate) (App. A at 12a, n. 4).

THE JURY'S VERDICT

After the district court denied defendants' motion for a directed verdict, the case was submitted to the jury, which sustained all three of IDC's antitrust claims and awarded damages before trebling of $13.2 million—the precise amount sought by the plaintiff.[25] Defendants then moved for judgment *n.o.v.*, contending that there was no rational basis for the jury's findings of antitrust liability and damages. The motion was denied.[26]

THE DECISION BELOW

On appeal, the court of appeals unanimously reversed, holding that no reasonable jury could have found either an attempt to monopolize, or a conspiracy to monopolize or restrain trade.

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23 A1001-02, A0785-807, A1862.

24 This figure comes from IDC's own damage theory (PX 224 (A0455-68)). Although IDC offered no market share evidence at trial, the record permitted reasonable estimates. According to IDC, with $22.7 million in 1982 revenues, it commanded 50% of the alleged relevant market immediately prior to NRT's entry (A1128, A1809; PX 224 at 10(A0464)). It follows from IDC's own proof, therefore, that the total "market," was approximately $45.4 million. On this basis, IDC's $7.3 million revenue decline in 1983—from $22.7 million to $15.4 million—represented a 17 percentage point drop in market share from 50% to 33%.

25 A0181-87; A2241-42. The jury rejected a claim that defendants had misappropriated IDC trade secrets.

26 The district court ordered a slight remittitur of IDC's treble damage award from $39.6 million to $38.2 million.

With respect to the attempt claim, the court below "presumed" for purposes of its analysis that NRT had the specific intent to monopolize and had engaged in some form of anticompetitive conduct (App. A at 8a).[27] But the court concluded that, given the competitive structure of the market and the low entry barriers, in no event could the jury have reasonably found the requisite dangerous probability of monopolization:

> "Under the conditions in the market for the carriage of garments on hangers in the Pennsylvania Corridor . . . , NRT's market share was not sufficiently significant to give rise to a dangerous probability that it would monopolize the market even when its anticompetitive conduct is taken into account. A jury could not reasonably find that such a probability existed without engaging in speculation concerning matters not in evidence.
>
> "Thus, we conclude that IDC failed as a matter of law to establish that NRT, which had at most a seventeen percent market share one year after it entered an intensely competitive market with low entry barriers, had a danger-

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27 Given Eskow's version of his meeting with Walsh (although it was sharply contradicted by Walsh), defendants did not argue in the court below that the evidence was insufficient to sustain a finding of a specific intent to monopolize. Defendants did, however, vigorously maintain that there was no reasonable basis for any finding of predatory pricing, the only alleged anticompetitive conduct submitted to the jury (A2215-16). In that connection defendants contended that the plaintiff's predatory pricing study was fatally defective because it employed the wrong legal standard—that is, in the case of a start-up operation like NRT's, it was erroneous to test NRT's start-up prices against actual, rather than reasonably anticipated, variable costs. *See* Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 1074 (1982). The court of appeals expressly left this point undecided (App. A at 8a, n. 2) because it was able to dispose of the attempt-to-monopolize claim on the ground that the record did not permit a reasonable jury to find a dangerous probability that the relevant market would be monopolized by the alleged predatory pricing. By the same token, the court below did not reach defendants' further contention that since NRT's rates were at or above those of existing competitors other than the plaintiff's, NRT's pricing was not predatory as a matter of law.

ous probability of successfully monopolizing that market" (App. A at 13a).

As for the conspiracy claims, after assessing the record to determine "whether the totality of the evidence, viewed most favorably to the plaintiff, was sufficient to support the jury's verdict" (*Id.* at 15a-16a), the court of appeals concluded that the evidence "simply does not give rise to a reasonable inference that any of the IDC defendants agreed to assist Walsh in waging a predatory price war, or to do anything else except work for him" (*Id.* at 17a). Since "plaintiff did not offer a scintilla of evidence that any of the IDC defendants knew of or participated in the predatory pricing scheme" (*Id.* at 19a), the plurality of actors necessary for a finding of conspiracy under Sections 1 and 2 of the Sherman Act was lacking, and the defendants were therefore entitled to the entry of judgment in their favor.[28]

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28 In light of its rulings on the Sherman Act violation issues, the court of appeals did not reach defendants' additional contention that the record provided no rational basis for the damage award, which (1) assumed that every sale which IDC lost in 1983 was diverted to NRT, despite IDC's admission that it proved only about half of its lost sales went to NRT; (2) assumed that IDC would not have lost a single 1983 sale to NRT had it not been for NRT's alleged predatory pricing, despite the fact that, as a new entrant, NRT would inevitably have taken some business from IDC—even without underpricing it; and (3) projected IDC's 1983 lost sales for a 10-year period on the bizarre assumptions (a) that once plaintiff had lost a customer, its business could never be regained, despite the admitted fact that by 1984 NRT had raised its rates to IDC's level, and (b) that for the entire 10-year period IDC would not have been able to reduce any of the expenses which it treated as fixed in the year 1983.

Other issues raised by defendants which the court below had no occasion to reach concerned prejudicial errors in the jury instructions with respect to the district court's refusals to define "monopoly power" under Section 2 and to explain the nature of the rule-of-reason inquiry under Section 1.

REASONS FOR DENYING THE WRIT

I.

The dispositive reason for denying the writ is that this Court does not sit to reassess the sufficiency of the evidence to support jury verdicts after the court of appeals has discharged that function in accordance with accepted standards of appellate review. That is what happened here. Scrutinizing the evidence as a whole in the light most favorable to the plaintiff, the court below concluded that no reasonable jury could have found any of the alleged antitrust violations. In reaching that conclusion the court made a "careful search of the record" (App. A at 17a) compiled during a six-week trial in a case that should never have survived the defendants' motion for a directed verdict.

II.

In reviewing the record, the court of appeals correctly applied settled principles of antitrust law. There is nothing novel about its determination.

First, the court below properly recognized—as did the trial judge in his instructions to the jury[29]—that there are three essential elements to a claim of unilateral attempted monopolization under Section 2 of the Sherman Act. The plaintiff must show that: (1) the defendant specifically intended to monopolize; (2) the defendant, in furtherance of that objective, actually engaged in anticompetitive conduct; and (3) the defendant's conduct, while falling short of achieving monopoly power, created a "dangerous probability" of achieving it.[30] Thus, even if the first two elements of the offense are estab-

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29 A4689.

30 Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 54 (2d Cir. 1979).

lished, failure to prove a dangerous probability of monopolization is fatal to the plaintiff's cause.

There is nothing new about the requirement that an attempt to monopolize claim be supported by proof of a dangerous probability that monopoly power will ultimately be achieved. The requirement harks back to Mr. Justice Holmes' opinion in *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905). The jury was so charged in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946).[31] And, except for the aberrational *Lessig* case and its progeny in the Ninth Circuit,[32] it has been recognized as an indispensable element of proof by a uniform stream of federal appellate precedents.[33]

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31 The trial judge in the *American Tobacco* case defined an attempt to monopolize as "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it."

32 Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). Even in the Ninth Circuit certain panels have not followed *Lessig*. *See* Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. of Pa. L. Rev. 125, 155 (1980).

33 *E.g.*, *First Circuit*: George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 550, 554 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Second Circuit*: Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980); *Third Circuit*: Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Fourth Circuit*: Stearns v. Genrad, Inc., 752 F.2d 942, 947 (4th Cir. 1984); *Fifth Circuit*: Deauville Corp. v. Federated Dept. Stores, Inc., 756 F.2d 1183, 1191 (5th Cir. 1985); *Sixth Circuit*: White and White, Inc., v. Am. Hospital Supply Corp., 723 F.2d 495, 506-08 (6th Cir. 1983); *Seventh Circuit*: Mullis v. Arco Petroleum Corporation, 502 F.2d 290, 297 (7th Cir. 1974); *Eighth Circuit*: National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1025 (8th Cir. 1985); *Tenth Circuit*: E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *Eleventh Circuit*: Quality Foods v. Latin AM. Agribusiness Devel., 711 F.2d 989, 996 (11th Cir. 1983); *District of Columbia Circuit*: Neumann v. Reinforced Earth Co., 786 F.2d 424, 428 (D.C. Cir.), *cert. denied*, 107 S.Ct. 181 (1986); *Federal Circuit*: Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 875 (Fed. Cir. 1985). *See also*, General Foods Corp., 3 Trade Reg. Rep. (CCH) ¶ 22,142 at

It is for good reason that the courts insist that there be proof not only of monopolistic intent and anticompetitive conduct, but also a dangerous likelihood that the defendant will ultimately succeed in acquiring monopoly power. As this Court has explained, unilateral conduct is unlawful only when it "pose[s] a danger of monopolization" because this "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). That risk is especially great where, as here, the challenged conduct involves vigorous price competition, since cutting prices in order to secure business is the very essence of competition. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 106 S.Ct. 1348, 1360 (1986). In declining the plaintiff's invitation to dispense with the necessity of proving a dangerous probability of monopolization, the court below acted not only in accordance with settled precedent but with a view toward preserving the competitive values which the antitrust laws are designed to promote.

Petitioner would have this Court depart from established precedent, including its own, and adopt a rule of *per se* illegality under Section 2 applicable to a "single firm's intentional anticompetitive behavior" (Petition, p. 15). In other words, it would expunge the "dangerous probability" requirement from the law, despite the fact that the Court only recently reiterated that "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization."

22,977 (F.T.C. 1984) ("The more elusive assessment of conduct . . . can be avoided where no dangerous probability of successful predation is present"). Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, 783 F.2d 159 (10th Cir. 1986), cited by petitioner (Petition, p. 15), is not to the contrary. The jury instructions in that case, which were upheld on appeal, expressly required a finding of "a dangerous probability that King Soopers could succeed in monopolizing the relevant market"—a finding that presupposed that the defendant possessed "market strength that approaches monopoly power; that is, the ability to control prices and exclude competition" (783 F.2d at 162).

Copperweld Corp. v. *Independence Tube Corp.*, *supra*, 467 U.S. at 768. The rule advocated by petitioner is thus at war not only with controlling judicial precedent but with recognized legislative intent.

This is hardly the first time that a petitioner has sought review in this Court of the need to show a dangerous probability of success in an attempt-to-monopolize case. Ever since *Lessig* was decided by the Ninth Circuit more than 20 years ago, the Court has repeatedly declined to grant *certiorari* in such cases. *See Mobil Oil Corp.* v. *Blanton*, 471 U.S. 1007, 1008 (1985) (Mr. Justice White, dissenting). Beyond that, this is not an appropriate case in which to consider the *Lessig* question because the court of appeals did not *find*, but simply *presumed*, the existence of anticompetitive conduct in the form of predatory pricing. In so doing, it never reached (1) defendants' frontal attack on the measure of cost employed by IDC's pricing study,[34] or (2) the further argument that NRT could not have been guilty of predatory pricing when, as the court below found (App. A at 12a), its rates were at or above the levels of competitors other than IDC.[35]

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34 IDC's predatory pricing claim was based solely upon a study which attempted to prove only that NRT's 1983 entry rates were below its actual variable cost during its startup period, rather than trying to prove that NRT's rates were below its "reasonably anticipated" variable costs—a fatal failure, defendants argued, particularly in the case of a new entrant like NRT whose actual variable costs are expected to be abnormally high during its startup period; indeed, for NRT to have charged non-predatory prices under IDC's study, it would have been obliged to enter the market with rates 50% above IDC's (A1765-66)—competitive suicide for a newcomer trying to wrest business away from the entrenched market leader.

35 Petitioner's argument that this case involves anticompetitive conduct in addition to alleged predatory pricing is belied not only by the court of appeals' review of the record (App. A at 17a), but by the district court's charge to the jury ("IDC s claim of anticompetitive conduct is that defendants engaged in predatory pricing") (A2215-16). Specifically, petitioner's assertions that defendant Walsh engaged in a pattern

As a fall back position, petitioner argues that this Court should review the case in order to adopt a "sliding scale approach for demonstrating the elements of an attempt to monopolize" (Petition, p. 18). Wholly apart from its lack of merit, this theory was not presented to the jury, was not briefed below, and should not be trotted out for the first time at this late date.

Applying established law, the court of appeals was eminently correct in concluding that no reasonable jury could have found a dangerous likelihood that Walsh would monopolize the relevant market. Petitioners have conceded that the claimed predatory pricing did not continue after the first year of NRT's operations. At that juncture, the plaintiff still possessed a commanding 33% of the market, whereas the defendant—a new entrant—enjoyed no more than half that share. Even more importantly, the market, freed from the constraints of prior government regulation, had witnessed an influx of other competitors, thereby attesting to virtually non-existent barriers to entry. It is common ground among courts, economists and legal commentators that if a market is easy to enter, there is no reasonable prospect that it can be monopolized. That is because no competitor in such a market, however large its share, can exercise market power since any effort to raise its prices to supracompetitive levels will trigger new entry and preclude the realization of monopoly profits. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 106 S.Ct. 1348, 1357-58 (1986); *cf. United States* v. *Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) (upholding merger producing nearly a 50% market share; no reasonable probability that competition would be substantially lessened since entry barriers low). The short of the matter is that the evidence of ease of entry in this case was overwhelming, and the court of appeals properly held that no

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of acquisitions in the relevant market, hired employees to damage competitors rather than on their merit, and intimidated customers are wholly unsupported by the record.

reasonable jury could have found otherwise (App. A at 13a).[36] Far from being a candidate for monopolization, the Pennsylvania corridor was much more competitive a year after the entry of NRT and the other carriers than it had been when the plaintiff controlled half the business and there were only five other competitors.

Little need be said about the conspiracy counts. There was not a shred of evidence to support the alleged pre-employment conspiracy claim that was submitted to the jury.[37] All that the plaintiff showed was that several disaffected IDC employees were hired by Walsh. There was no evidence whatsoever that any of these employees was even aware of, much less that they joined, any predatory pricing scheme against IDC.

In sum, this case was correctly decided on its facts by the court below and presents no issue worthy of review by this Court.

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36 The evidence included not only the advent of a host of new competitors in the relevant market, but findings by the Department of Justice, FTC and ICC which are epitomized by the statement that "trucking has no significant entry barriers . . . even for the LTL segment." DTX 223, DOJ Comments at 16 (A0643).

37 The district court correctly instructed the jury, without objection by the plaintiff, that it could not find a conspiracy between Walsh and the former IDC employees *after* they had gone to work for NRT because "employees of what's essentially the same entity for antitrust purposes cannot conspire with one another or the entity that employs them while they are employees of that entity" (A2225). *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

MILTON HANDLER
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May 14, 1987

PROOF OF SERVICE

I, Milton Handler, attorney for Respondents herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 14th day of May, 1987, I served copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari by delivering same by hand to Malcolm A. Hoffmann, 12 East 41 Street, New York, New York 10017. I further certify that all parties required to be served have been served.

May 14, 1987

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